No. 83-____

83 - 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GARY JOHN EKLUND,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

RUSSELL JAMES MARTIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETER M. SHANE,
Counsel of Record
Cooperating Attorney,
Iowa Civil Liberties Union
3019 Pinecrest Road
Iowa City, Iowa 52240
(319) 353-5489

MARK W. BENNETT
Staff Counsel
Iowa Civil Liberties Union
Des Moines, Iowa 50312

CHARLES S. SIMS
BURT NEUBORNE
American Civil Liberties Union
New York, New York 10036

May, 1984

QUESTIONS PRESENTED

These cases present two issues not otherwise raised currently for this Court's review:

1. Is the offense of nonregistration with the Selective Service under 50 U.S.C. App. sec. 453 and 462 a completed offense at the expiration of the prescribed period for registration or a "continuing offense" that runs to the time of indictment? (Eklund and Martin)

2. Does a defendant's prima facie showing that he has been singled out on the basis of his exercise of First Amendment rights for prosecution for refusal to register with the Selective Service entitle him to an evidentiary hearing for the adjudication of his "selective prosecution" claim? (Eklund)

In addition, these cases present three issues raised for review also by Wayte v. United States, petition for cert. filed, 52 U.S.L.W. 3613 (U.S. Feb. 2, 1984) (No. 83-1292), to review, 710 F.2d 1385 (9th Cir. 1983):

3. May the United States validly investigate and prosecute for refusal to register with the Selective Service only those individuals who are selected pursuant to an enforcement program designed to identify vocal opponents to draft registration? (Eklund)

4. May an individual be convicted for violating a Selective Service regulation not issued in accordance with the 60-day notice and comment requirement to which the Selective Service bound itself under statutory rulemaking authority delegated by the President to the Director of the Selective Service? (Eklund)

5. May an individual be convicted of violating a presidential proclamation issued under 50 U.S.C. App. sec. 453 that is not promulgated in accordance with the 30-day notice-and-comment requirement imposed by 50 U.S.C. App. sec. 463(b) on regulations issued under 50 U.S.C. App. sec. 453? (Eklund)

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

CASES:

Supreme Court Decisions:

Court of Appeals Decisions

No. 83-___

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GARY JOHN EKLUND,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

----------*----------

RUSSELL JAMES MARTIN,
Petitioner,

-v.-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioners Gary John Eklund and Russell James Martin respectfully request that this Court grant their petitions for writs of certiorari to review the judgments and opinions entered in their respective cases on May 4,

1984 by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The as-yet unpublished en banc opinions of the court of appeals in Eklund and Martin appear in the Appendix hereto at 1a and 88a, respectively. The 1982 opinion of the United States District Court for the Southern District of Iowa in Eklund, reported at 551 F.Supp. 964, appears in the Appendix, at 97a. The 1982 opinion of the United States District Court for the Northern District of Iowa in Martin, reported at 557 F.Supp. 681, appears in the Appendix at 124a.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. sec. 1254(1) to review the judgments entered on May 4, 1984 by the United States Court of Appeals for the Eighth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATUTES AND REGULATIONS INVOLVED

50 U.S.C. App. sec. 453(a), which is set out in full in the Appendix at 161a, provides in pertinent part that males between the ages of 18 and 26 may be required to register with the Selective Service "at such time or times and place or places and in such manner, as shall be determined by proclamation of the President and by rules and regulations . . . ."

50 U.S.C. App. sec. 462(a), which is set out in full in the Appendix at 162a, provides

that "any person" commits an offense who "knowingly . . . evades or refuses registration . . . ."

50 U.S.C. App. sec. 462(d), which is set out in full in the Appendix at 163a, prescribes the period during which any prosecution for nonregistration with the Selective Service must be commenced.

Proclamation 4771, 3 C.F.R. 82 (1981), set out in full in the Appendix at 165a, specifies certain details of the obligation to register imposed by 50 U.S.C. App. sec. 453(a) upon draft-age males, and delegates to the Director of the Selective Service the responsibility to prepare other necessary rules and regulations. In pertinent part, the Proclamation provides: "Persons born in the calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980." Sec. 1-102, 3 C.F.R. 82, 83 (1981).

Under 50 U.S.C. App. sec. 460(b)(1): "The President is authorized--(1) to prescribe the

necessary rules and regulations to carry out the provisions of this title [50 U.S.C. App. secs. 451-471a]."

Under 50 U.S.C. App. sec. 460(c): "The President is authorized to delegate any authority vested in him under this title [50 U.S.C. App. secs. 451-471a], and to provide for the subdelegation of any such authority."

Section 1 of Exec. Order No. 11623, 3 C.F.R. 614 (1971-1975 Comp.), reprinted in 50 U.S.C. App. note following sec. 460, provides:

> The Director of Selective Service (hereinafter referred to as the Director) is authorized to prescribe the necessary rules and regulations to carry out the provisions of the Act. Regulations heretofore issued by the President to carry out such provisions shall remain in effect until amended or revoked by the Director pursuant to the authority conferred by this Order.

50 U.S.C. App. sec. 463(b), which is set out in full in the Appendix at 164a, provides that no regulation issued under the Military Selective Service Act will be effective until the expiration of a 30-day notice and comment

period, except when such requirement is expressly waived by the President.

STATEMENT OF THE CASES

A. General Background

These cases raise significant issues that are potentially posed at some stage in each of the prosecutions for Selective Service nonregistration that the Government has brought under its so-called "passive enforcement system." See United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3613 (U.S. Feb. 2, 1984) (No. 83-1292).

Petitioner Gary John Eklund was convicted and sentenced to two years incarceration for failure to register with the Selective Service. The district court denied Eklund's motions for a hearing and further discovery on his defense of "selective prosecution." It also denied his motions to dismiss the indictment because the offense was improperly charged as a continuing

offense, and because the proclamation and regulations imposing on him an obligation to register were not lawfully promulgated. On appeal, the Eighth Circuit took the case en banc sua sponte, and upheld Mr. Eklund's conviction by a 5-4 vote.

Petitioner Russell James ("Rusty") Martin was indicted for failure to register with the Selective Service. The district court granted his motion to strike as surplusage those portions of the indictment alleging a continuing offense of nonregistration. The Government consequently took an interlocutory appeal. Subsequent to oral argument before a three-judge panel of the Eighth Circuit, the court of appeals vacated the submission to that panel and took the case en banc sua sponte. The court, by 5-4 vote, overturned the district court ruling in favor of Mr. Martin.

B. The Duty to Register

The Military Selective Service Act, 50 U.S.C. App. sec. 453(a), provides that males

between the ages of 18 and 26 may be required to register with the Selective Service. The statute delegates to the President the authority to define the precise legal obligations demanded of potential registrants.

On July 2, 1980, pursuant to this authority, President Carter issued Proclamation No. 4771, 3 C.F.R. 82 (1981), reprinted in 50 U.S.C. App. note following sec. 453, directing certain male citizens to register at particular dates, depending on their dates of birth. As relevant to these cases, the Proclamation directed male citizens born during 1960 to register "on any of the six days beginning Monday, July 21, 1980," Id., sec. 1-102, at 83. The Proclamation further specified the places for registration, and confirmed a prior presidential delegation of authority to the Director of the Selective Service to prepare other rules and regulations that would complete the definition of the legal duty to register.

Proclamation No. 4771 required registration to begin within three weeks after its promulgation. There had been no prior Federal Register notice that the Proclamation would be issued, and the Proclamation made no provision for a period for public comment prior to its effective date.

Prior to the issuance of Proclamation No. 4771, the Director of the Selective Service had issued regulations "to provide revised procedures for the administration of registration in the event the President issues his Proclamation directing that registration be conducted." 45 Fed.Reg. 40577 (1980). These regulations describe the specific manner in which persons required to register may complete their registration. 32 C.F.R. Pt. 1615 (1983). The regulations were issued in final form on July 18, 1980, after a 32-day notice and comment period. 45 Fed.Reg. 48130 (1980).

C. The Passive Enforcement System

Pages 4 through 7 of the petition for

certiorari filed on February 2, 1984 in United States v. Wayte (No. 83-1292) detail the "passive enforcement system," under which petitioners Eklund and Martin, like petitioner Wayte, were targeted for prosecution. For men born during 1960, the Government's explicit prosecutorial policy for enforcement of Proclamation No. 4771 and 50 U.S.C. App. sec. 453 has been to target for investigation only two classes of nonregistrants: (a) persons who declare themselves to the Selective Service to be nonregistrants; and (b) persons reported to the Selective Service as nonregistrants by third parties.

Despite Government estimates that over half a million men are not in compliance with Proclamation No. 4771 and 50 U.S.C. App. sec. 453, this enforcement policy has led to the indictments of fewer than 20 individuals so far -- all of whom are political or moral dissenters against the registration system.

The Justice Department, although it did not

initiate the "passive enforcement system," participated in this program along with the Selective Service. Documents proffered to the district courts in Eklund and Martin, most of which were also proffered at the evidentiary hearing in Wayte, demonstrated:

1. The Justice Department recognized the drastic underinclusiveness of the system;

2. The Justice Department anticipated, in a June 30, 1982 memorandum, that "the first prosecutions are liable to consist of a large sample of persons who object on religious and moral grounds and persons who publicly refuse to register";

3. The Government knowingly had available to it alternative enforcement systems that would have been more inclusive and nondiscriminatory;

4. The decision to use the "passive enforcement system" involved high-level political officials with no statutory responsibility for law enforcement; and

5. The Justice Department anticipated that public disclosure of the "passive enforcement system" would provide a disincentive for legal compliance with Proclamation No. 4771 and 50 U.S.C. App. sec. 453.

The district court in Martin, like the district court in Eklund, denied petitioner's

motion for further discovery and a hearing on the issue of selective prosecution. Although petitioner Martin's prima facie showing of discrimination was essentially the same as Mr. Eklund's, the dissent below in Eklund cites evidence from the Martin record tending to show not only that the "passive enforcement system" was discriminatorily motivated in its inception, but also that the system was discriminatorily administered. Eklund, slip op. at 41-2, App. at 81a-83a. Specifically, as of September, 1982, the Justice Department--without explanation--had sought indictments against only 13 of 134 apparent nonregistrants whose names had been forwarded to it by the Selective Service under the passive enforcement system. The cases of 82 men who failed to reply to the Selective Service's warning letters--only 37 of which were returned as undelivered--were not pursued further. The only indictments sought were against persons whose responses to the

Service's letters cited continuing political or moral opposition to draft registration.

D. Indictments and Proceedings Below

1. Eklund

Gary Eklund was indicted by a grand jury on August 31, 1982 on one count of willful nonregistration with the Selective Service in violation of 50 U.S.C. App. secs. 453(a) and 462(a). Mr. Eklund's extensive pretrial motions for a hearing and further discovery on his "selective prosecution" defense, and to dismiss the indictment against him, were denied on October 8 and 15, 1982, respectively. Mr. Eklund was convicted by a jury on October 27, 1982, and, on December 2, 1982, sentenced to two years imprisonment.

Uncontroverted testimony at trial indicated that the Government commenced its investigation of Mr. Eklund only after the Government received a letter from Mr. Eklund declaring that he was opposed to the Selective Service system and had not registered. Nearly a year

after the period prescribed by Proclamation No. 4771 for his registration, the Government engaged in correspondence and interviews with Mr. Eklund, seeking his registration. Mr. Eklund declined to register. The Government introduced no evidence of Mr. Eklund's state of mind concerning the duty to register that antedated his January 3, 1981 letter to the Government.

Mr. Eklund testified that, during the July, 1980 period prescribed for his registration, he believed the registration system was no longer in force, based on newspaper articles detailing the third circuit opinion that held the system unconstitutional because it excluded women from the obligation to register.

2. Martin

On October 5, 1982, petitioner Martin was indicted by a grand jury on one count of failing to register with the Selective Service, in violation of 50 U.S.C. App. secs. 453(a) and 462(a). He moved to dismiss the indictment and

asserted as one ground for dismissal that the offense of failing to register was not a continuing offense as charged in the indictment. On November 19, 1982, the district court ruled in Mr. Martin's favor, striking as surplusage the reference in the indictment to a continuing offense.

Like Mr. Eklund, petitioner Martin came to the Government's attention only after writing to the Government to declare his opposition to a draft system and his status as a nonregistrant. He also refused Government invitations, long after the July, 1980 period prescribed for his registration, to register with the Selective Service tardily.

REASONS FOR GRANTING THE WRITS

All of the issues raised in this petition are potentially involved at some stage in each of the Government's recent prosecutions for Selective Service nonregistration -- all of which have exclusively targeted vocal protestors against draft registration. Three of the five issues raised in Eklund are identical to the issues raised for this Court's review by the petitioner in United States v. Wayte, 710 F.2d 1385 (9th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3613 (U.S. Feb. 2, 1984) (No. 83-1292). The Government's May 7, 1984 request that this Court grant certiorari to review the passive enforcement issue in Wayte signals the importance of these cases.

Eklund and Martin additionally raise two other important questions for this Court's review. The first is a significant issue of statutory interpretation with respect to the Military Selective Service Act, on which a bare

majority of the Eighth Circuit flatly contradicts this Court's determination that draft nonregistration is not a "continuing offense." This issue was not raised in the Government's interlocutory appeal to the Ninth Circuit in Wayte and is not raised in the Wayte petition for certiorari. The issue has been posed to the trial court in Wayte, however, and this Court's review of the issue would control Wayte as well.

The second issue is the conflict posed between the Eighth and Sixth Circuits as to the evidentiary showing a defendant must proffer to be entitled to a hearing and discovery on the issue of "selective prosecution." The barrier to factfinding that the Eighth Circuit places in the way of a defendant who alleges that a prosecution is unconstitutionally motivated is, in practice, insuperable.

Certiorari is required in these cases to resolve critical conflicts among the Circuits with respect to the law of "selective

prosecution," to enforce obedience to law settled by this Court, and to resolve issues of statutory implementation potentially involved in each of the Government's nonregistration prosecutions.

1. The Eighth Circuit's En Banc Decision in Eklund Should Be Reviewed for the Three Reasons Set Forth in the Petition for Certiorari in Wayte v. United States (No. 83-1292) for Review of the Ninth Circuit Decision in Wayte.

Three of the five questions presented by Eklund are identical to the three issues raised for this Court's review by the petition for certiorari filed in another Selective Service nonregistration case. Wayte v. United States, petition for cert. filed, 52 U.S.L.W. 3613 (U.S. Feb. 2, 1984) (No. 83-1292), to review 710 F.2d 1385 (9th Cir. 1983). Certiorari is appropriate in Eklund, as in Wayte, because:

1. The court of appeals decision upholding the Government's passive enforcement system for prosecuting vocal draft nonregistrants directly conflicts with a recent Sixth Circuit decision, see Wayte petition, pp. 9-12;

2. The court of appeals decision enforcing the Selective Service regulations issued under Proclamation No. 4771 conflicts with this Court's decisions requiring an administrative agency to follow its own validly adopted procedures, see Wayte petition, pp. 14-19; and

3. The court of appeals decision enforcing Proclamation No. 4771 raises significant and recurring issues concerning the proper interpretion of Section 13(b) of the Military Selective Service Act, see Wayte petition, pp. 12-14.

The Government, on May 7, 1984, joined in Wayte in asking that the passive enforcement system be reviewed by this Court. Because the Eighth Circuit's Eklund opinion on the above issues, including the passive enforcement issue, does not differ significantly in its reasoning from the Ninth Circuit opinion in Wayte, and there is no difference between the factual records in Wayte and Eklund material to any of these issues, it would serve no useful purpose to repeat here the arguments offered for review by the Wayte petition. Petitioner Eklund respectfully requests that this Court review

the Eighth Circuit judgment in his case for the reasons set forth in the petition in Wayte.1/

1/ On the procedural unlawfulness of Proclamation No. 4771 and the implementing regulations, petitioner Eklund would stress two points to which the Wayte petition refers.

First, as to the regulations, it is legally irrelevant to the judicial enforceability of the Selective Service's self-imposed 60-day notice-and-comment requirement for Service regulations, 43 Fed.Reg. 50980-81 (1978), that the impetus for the adoption of that requirement was a policy separately embodied in an executive order inapplicable to the Selective Service. Exec. Order No. 12044, sec. 6(b)(2), 3 C.F.R. 152, 156 (1979). The notice-and-comment requirement is supportable by statutory authority delegated by the President to the Director of the Selective Service, Exec. Order No. 11623, 3 C.F.R. 614 (1971-1975 Comp.), reprinted in 50 U.S.C. App. note following sec. 460, and thus has the force and effect of law.

To cite an obvious analogy, many agencies have adopted notice-and-comment procedures going beyond the mandate of the Administrative Procedure Act, 5 U.S.C. sec. 553, in accord with judicially unenforceable recommendations of the Administrative Conference of the United States. See, e.g., Rodway v. United States, 514 F.2d 809, 814 (D.C. Cir. 1975). Such procedures are judicially enforceable against the adopting agencies notwithstanding the unenforceability of the recommendation for their issuance. Id.

As for the Proclamation, there is simply no reason to suppose that Congress intended the notice-and-comment requirement that 50 U.S.C. App. sec. 463(b) imposes on "regulations" issued under 50 U.S.C. App. sec. 453 to exempt "proclamations" that are issued under Section 453, which are functionally identical to such regulations.

2. The Eighth Circuit's En Banc Decisions in Eklund and Martin Construing Nonregistration with the Selective Service as a "Continuing Offense" Contradict This Court's Interpretation of the Same Offense.

An additional essential reason for granting certiorari in these cases is the Eighth Circuit's flat contravention of this Court's decision in Toussie v. United States, 397 U.S. 112 (1970). In Toussie, this Court held that failure to register with the Selective Service under 50 U.S.C. App. sec. 453 is not a continuing offense. This Court further articulated the test, based in part on due process concerns underlying the "rule of lenity," id. at 122, for discerning whether an offense should be construed as a continuing offense:

> [S]uch a result [i.e., construing an offense to be a continuing offense] should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

Toussie, 397 U.S. at 115. Although neither 50 U.S.C. App. sec. 453, nor any other substantive provision of the Military Selective Service Act has been materially amended since Toussie, a bare majority of the Eighth Circuit has held that 50 U.S.C. App. sec. 453 now does prescribe a continuing offense.

The crux of the Eighth Circuit's reasoning is that Congress converted draft nonregistration to a continuing offense when it amended the statute of limitations in 50 U.S.C. App. sec. 462(d). Eklund, slip op. at 19, App. at 39a. As amended, that section now provides that a nonregistrant may be prosecuted for up to five years after his 26th birthday, "or within five years next after the last day before such person does perform his duty to register, whichever shall first occur." (Emphasis added.) It is the underscored reference to "duty to register" that the court of appeals regards as the "explicit language" mandating that nonregistration be treated as a

continuing offense.

This is plainly wrong.2/ Prior to Toussie, the Selective Service had promulgated a regulation, which no longer exists, imposing a continuing duty to register. This Court, discussing that regulation, said: "[N]either the regulation nor the Act itself requires that failure to register be treated as" a continuing offense. Toussie, 397 U.S. at 121 n. 17. If the imposition by a lawful regulation of a "continuing duty" to register does not create a continuing offense, it is impossible to see why a statutory reference to a "continuing

---

2/ The purposes of Congress's post-Toussie amendments to 50 U.S.C. App. sec. 462(d) were (a) to provide an incentive for tardy registration even when a legal violation had occurred, and (b) to render 26-year-olds who had never registered liable for prosecution for up to five more years. Neither of these purposes led Congress, or logically should have led Congress, to make nonregistration a continuing offense.

The only ambiguity of sec. 462(d) is whether the Act itself now imposes a "continuing duty to register," which is unrelated to the offense of nonregistration, or simply ratifies the kind of regulation the Selective Service had in force at the time of Toussie. The dissenters below adopted the latter interpretation. Eklund, slip op. at 35-6, App. at 68a-70a.

duty" has a contrary result.

The incorrectness of the Eighth Circuit's statutory interpretation is even more apparent because it renders the statute unconstitutionally vague for failing to define the offense of nonregistration clearly. Grayned v. City of Rockford, 408 U.S. 104 (1972). As Chief Judge Lay wrote for four dissenters below:

> There is not one word or sentence in the Act itself, in the Presidential Proclamation, or in the regulations that requires a registrant to register beyond the times specified in the President's proclamation.

Eklund, slip op. at 39, App. at 76a. It is an elementary principle that statutes should be construed to avoid constitutional difficulty.3/

Certiorari is appropriate to enforce the interpretation of 50 U.S.C. App. sec. 453 already settled by this Court.

3/ If nonregistration is a continuing offense, rendering tardy registration a legal obligation subject to criminal sanction, a serious fifth amendment self-incrimination problem would also be posed. Such a requirement that a nonregistrant register late would amount to compulsion that the nonregistrant incriminate himself, in violation of the fifth amendment privilege. Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968).

3. The Eighth Circuit's En Banc Decision in Eklund Denying Eklund an Evidentiary Hearing and Discovery on the Issue of "Selective Prosecution" Conflicts With a Recent Sixth Circuit Decision.

Gary Eklund proffered to the district court a compelling prima facie case that his prosecution amounted to unconstitutionally motivated retaliation against his political protest. By a 5-4 vote, the Eighth Circuit en banc upheld the district court's conclusion that Mr. Eklund's extensive showing did not warrant further discovery against the government or an evidentiary hearing. This decision conflicts with the unanimous panel decision in United States v. Schmucker, 721 F.2d 1046, 1052 (6th Cir. 1983), reh'g en banc den., 729 F.2d 1040 (6th Cir. 1984), which granted the defendant a hearing based on essentially the same prima facie showing as Eklund's. It likewise conflicts with the district court ruling in United States v. Wayte, 549 F.Supp. 1376 (C.D. Cal. 1982),

granting the defendant a hearing -- a ruling the Government did not appeal. The Eighth Circuit's ruling is especially troubling because, if a prima facie case as strong as Mr. Eklund's does not entitle him to a hearing, there is no likelihood as a practical matter that a victim of unconstitutionally discriminatory prosecution could ever vindicate his or her right to equal protection.

Mr. Eklund's prima facie case of discrimination met the two-prong test articulated by the Eighth Circuit, and by every other court of appeals,4/ for proving selective prosecution. An individual asserting a selective prosecution defense must show he or she was singled out for prosecution while others similarly situated are not being prosecuted, and that the "singling out" was based on an impermissible criterion, such as

---

4/ A bibliography of cases throughout the circuits articulating the two-prong test for proving selective prosecution appears in Brief of Appellant at 26 n. 32, United States v. Eklund, No. 82-2505 (8th Cir. May 4, 1984).

the defendant's exercise of constitutional rights. United States v. Catlett, 584 F.2d 864, 866 (8th Cir. 1978). The test thus determines whether an individual belonging to a protected group or asserting constitutional rights has permissibly been prosecuted in spite of that fact, or whether the government has intentionally selected the defendant for prosecution because of an impermissible reason. Cf., Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

It is uncontrovertible that Mr. Eklund has been singled out while others similarly situated have not been: The Government estimates that between half a million and a million men similarly situated to Mr. Eklund have not registered for the draft and have not been investigated for possible prosecution. The dispute in this case thus centers on the adequacy of Mr. Eklund's prima facie showing that the reason for his being singled out was an impermissible reason.

Mr. Eklund's prima facie showing of discriminatory governmental purpose has five critical elements.

First, the Government has knowingly filed indictments only against political protestors.

Second, Mr. Eklund would not have been prosecuted except for his political protest. The sole reason he was targeted for investigation was his self-declaration to the Government that he had not registered and was opposed to the draft. This is not accidental, given the Government's enforcement system.

The Government's explicit policy was to investigate only self-declared nonregistrants and nonregistrants reported to the Selective Service by third-party informants. The willingness to investigate the subjects of third-party reports does not belie the inference of discrimination because public protestors are the most likely to be the focus

of such reports.4/

Third, government documents establish the Government's knowledge at the highest levels of the Justice Department that its passive enforcement policy would not only be radically underinclusive, but would likely focus on "moral and religious objectors, and political protestors." As Judge Heaney wrote in Eklund: "The evidence of the government's knowledge of a discriminatory impact certainly casts a reasonable doubt on its selection motive . . . ." Eklund, slip op. at 42, App. at 83a.

Fourth, the Government was aware that it had alternative enforcement systems available to it that would have been more effective and nondiscriminatory. This is critical because, unlike other cases in which prosecutions

---

4/ Although the record below is silent on the use of third-party informers in fact, the district court in Wayte observed that only one defendant prosecuted had been reported by a third party, United States v. Wayte, 549 F.Supp. 1376, 1384 n. 9 (C.D. Cal. 1982), and he was a vocal protestor against the draft, id., at 1379.

against vocal protestors have been upheld, this is not a case in which the Government policy can be defended as a deterrent against criminal violations by others. The sole conceivable impact of a program that openly focuses only on vocal nonregistrants is to encourage noncompliance followed by concealment. As Judge Heaney wrote in dissent below:

> Apparently the moral of the government's policy is: if you want to evade the draft registration law, do nothing, say nothing, and you will not be prosecuted. Only those with the courage and candor to write the government refusing to register will be punished.

Eklund, slip op. at 42, App. at 83a. There is no rational law enforcement purpose to be served by a passive enforcement system as the exclusive means of investigation and prosecution.

Fifth, the decision to enforce the registration law through a passive enforcement system was made with the participation of high-level political officials, including White House advisers, who have no ordinary statutory

responsibility for law enforcement. This departure from ordinary policymaking procedure, like the other kinds of evidence cited above, has been identified by this Court as precisely the kind of evidence that is relevant as to impermissible motive. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68 (1977).

The Eighth Circuit appears to have held this extensive showing insufficient to warrant further discovery and a hearing because Mr. Eklund's case does not logically foreclose all possibility that the Government's motive was, in fact, noninvidious.5/ The court was willing to hypothesize legitimate motives that might have been entertained consistently with the evidence Mr. Eklund has proffered. This approach, however, places an insuperable burden

---

5/ As the dissent in Eklund notes, additional evidence of irregular procedure in targeting Mr. Eklund, Mr. Martin, and others for these nonregistration prosecutions is available in the record from Martin. Eklund, slip op. at 41-2, App. at 81a-83a; see supra pp. 12-13.

on a defendant such as Mr. Eklund -- essentially requiring him to prove the merits of his case merely to get evidence for an adjudication of the merits. While parroting the lesser evidentiary standard adopted by every other court of appeals, the Eighth Circuit decision is, in fact, sharply contrary to the application of that standard by other courts. See United States v. Schmucker; United States v. Falk, 479 F.2d 616 (7th Cir. 1973); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972). What the Eighth Circuit requires would impermissibly turn the ordinary presumption of government good faith into a shield behind which all abusive prosecutorial discrimination could hide.

Certiorari is thus appropriate to resolve the conflict between the Eighth and Sixth Circuits and to establish a standard for granting hearings on selective prosecution that properly balances a defendant's rights against the legitimate government interests in

prosecutorial discretion. Under such a standard, a prima facie case such as Mr. Eklund's, which raises a reasonable question as to the Government's motive, should entitle the defendant to a hearing at which the Government bears the burdens of producing evidence and persuading the trial court that an impermissible purpose was not a "substantial factor" in the prosecution of the defendant. Mt. Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

CONCLUSION

For each of the foregoing reasons, petitioners Gary John Eklund and Russell James Martin respectfully request that this Court issue writs of certiorari in their respective cases to review the judgments of the United States Court of Appeals for the Eighth Circuit.

DATED: May 29, 1984

Respectfully submitted,

PETER M. SHANE
MARK W. BENNETT
CHARLES S. SIMS
BURT NEUBORNE

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 82-2505

UNITED STATES OF AMERICA, Appellee, v. GARY JOHN EKLUND, Appellant.	Appeal from the United States District Court for the Southern District of Iowa

Submitted: September 2, 1983

Filed: May 4, 1984

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, John R. GIBSON, FAGG and BOWMAN, Circuit Judge,

FAGG, Circuit Judge.

Gary John Eklund was convicted by a jury of willfully failing to register with the Selective Service System in violation of 50

U.S.C. App. §§ 453(a) and 462(a) and sentenced to imprisonment for two years. On appeal Eklund contends that the district court committed error in holding that his failure to register was not a completed offense at the expiration of the six-day registration period specified by Presidential Proclamation 4771, 45 Fed. Reg. 45,247 (1980), and that his continued failure to register after that time constituted a continuing offense. Eklund also contends that he was the victim of impermissible selective prosecution. Finally, he alleges that Proclamation 4771 and its implementing regulations were promulgated without providing the required notice and comment period.

Male persons residing in the United States who are between the ages of eighteen and twenty-six (with certain exceptions not pertinent here) are required to register with

the Selective Service as provided by the proclamation of the President and the Selective Service's rules and regulations. 50 U.S.C. App. § 453(a). President Carter initiated registration by issuing President Proclamation 4771 on July 2, 1980. Upon signing it, the President said that he was "deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union and occupation by them of this innocent and defenseless country...." 16 Weekly Compilation of Presidential Documents 1274, 1274 (1980). Then the President stated that by initiating registration with the Selective Service, "we are expediting the process by which, if our Nation enters a time of emergency or a threat to our national security or a time of war in the future, the marshaling of our defense mechanisms can be expedited. It's a precautionary measure: it's designed to make our country strong and to maintain

peace." Id. at 1275.

Although Eklund raises several issues on appeal, we observe at the outset that at bottom this case arose because of Eklund's failure to comply with the registration provisions implemented to protect the national security interests cited by President Carter.

A. Selective Prosecution

On July 28, 1982, the Selective Service Director, testifying before a subcommittee of the House Judiciary Committee, estimated that approximately 674,000 young men had not registered with the Selective Service. Statement of Thomas K. Turnage, Director of Selective Service, Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, 2 (July 28, 1982). Eklund asserts that as of September 1982 all of the 13 men indicted for failure

to register, including himself, were vocal opponents of the registration program. Accordingly, he contends that he was subjected to selective prosecution motivated by his exercise of his First Amendment right of free speech.

Eklund's prosecution resulted from a "passive enforcement" system initially relied upon by the government to identify non-registrants; under that system only those who were reported to the government by themselves or others were prosecuted. On January 3, 1981, some six months after Presidential Proclamation 4771 was issued, Eklund wrote to the Selective Service System expressing his opposition to registration. He stated that he did not register in July 1980 and would not register in the future. He volunteered to be the first person to be prosecuted for failure to register, and requested that the government inform him whether he would be prose-

cuted in order to end the uncertainty. On June 24, 1981, Eklund received a letter from Selective Service reminding him of his duty to register and informing him that if he failed to register his name would be referred to the Justice Department for investigation and possible prosecution. The letter was accompanied by a registration form. Eklund's case was eventually referred by the Justice Department to the office of the United States Attorney for the Southern District of Iowa. On October 5, 1981, an attorney in that office sent Eklund a letter similar to the earlier letter from Selective Service and enclosed a registration form. On January 7, 1982, President Reagan announced a grace period for non-registrants ending February 28, 1982. On August 24, 1982, an agent of the FBI personally delivered another letter from the office of the United States Attorney along with a registration form and additional

information. All of these letters focused on securing Eklund's registration. The grand jury returned its indictment on August 31, 1982.

In assessing Eklund's claims of selective prosecution, the district court applied the two-part test set forth in United States v. Catlett, 584 F. 2d 864, 866 (8th Cir. 1978):

> To establish the essential elements of a prima facie case of selective discrimination [sic], a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based on an impermissible ground, such as race, religion, or his exercise of his first amendment right to free speech. United States v. Berrios, 501 F. 2d 1207, 1211 (2d Cir. 1974).

"Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v.

Boles, 368 U.S. 448, 456 (1962). Indeed, our legal system vests prosecuting authorities with broad discretion. See Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978). Accordingly, meeting the two requirements of the Catlett test in order to prevail on a defense of selective prosecution thus constitutes a "heavy burden." United States v. Jennings, 724 F. 2d 436, 445 (5th Cir. 1984). The Catlett standard requires a showing of "intentional and purposeful discrimination." Catlett, supra, 584 F. 2d at 866. Eklund did not contest the validity of the Catlett standard in the district court, nor does he do so here. He argues as he must that his case fulfills the Catlett requirements.

The district court concluded that Eklund had been singled out for prosecution while others similarly situated had not been prosecuted. In making this determination, the

district court defined the class of others similarly situated as "most other willful non-registrants who could be identified by an 'active' enforcement program." United States v. Eklund, 551 F. Supp. 964, 968 (S.D. Iowa 1982). The government contends that Eklund failed to meet the requirements of the first part of Catlett, and that the district court was in error on this point. In view of our disposition of the second part of the Catlett test, however, we need not decide in this case whether Eklund received treatment different from others similarly situated, but for purposes of discussion we will assume that the district court properly defined the group of persons similarly situated and that Eklund was singled out from this group for prosecution.

The district court then went on to determine that Eklund had failed to establish that his selection for prosecution was based

on an impermissible ground. Id. The district court noted that the government's passive enforcement system would result in prosecution of some persons who exercised their First Amendment right of free speech by publicly speaking out against the draft registration law. Id. The court concluded, however, that

> there is no showing that the selection of these people for prosecution was based upon their exercise of the First Amendment right to free speech. Defendant has not demonstrated that he is being prosecuted because he has expressed his opposition to the draft registration law. The undisputed evidence shows that defendant is being prosecuted because he purposely identified himself to the Selective Service System as a non-registrant and has persisted in refusing to register by rejecting repeated opportunities to register that were offered to him by the government.

Id. Eklund contends that at the least he made a threshold showing which entitled him to an evidentiary hearing. We disagree.

In United States v. Catlett, supra, 584

F. 2d at 866, we noted that the following standards determine whether a hearing should be granted on a claim of selective prosecution:

> A hearing is necessitated only when the motion alleges sufficient facts to take the question past the frivolous state, United States v. Erne, 576 F. 2d 212 (9th Cir. 1978); United States v. Oaks, 508 F. 2d 1403, 1404 (9th Cir. 1974), and raises a reasonable doubt as to the prosecutor's purpose. United States v. Peskin, 527 F. 2d 71, 86 (7th Cir. 1975); United States v. Falk, 479 F. 2d 616, 620-21 (7th Cir. 1973) (en banc). Without such a showing the criminal prosecution is presumed to have been undertaken in good faith and in a nondiscriminatory manner pursuant to a duty to bring violators to justice. United States v. Falk, supra, 479 F. 2d at 620; United States v. Ojala, 544 F. 2d 940, 943 (8th Cir. 1976).

Eklund contends that the government impermissibly focused its prosecution efforts on the group of unregistered men who had exercised their First Amendment rights by expressing opposition to draft registration, and that his prosecution was a consequence of

his membership in this group. A disproportionate impact on dissenters, however, does not alone raise "a reasonable doubt" that it was a purpose of the government's prosecution policy to select for prosecution on the basis of the exercise of a constitutional right. It must be kept in mind that Eklund's letter included a clear admission that he had violated the law. This admission is not itself protected speech. Thus if Eklund was chosen for prosecution on the basis of his admission, and not because he expressed opposition to draft registration, the government's purpose in prosecuting him would not have been different from that in any other case in which an admission of guilt provides the basis for prosecution. Accordingly, the crucial issue is whether Eklund made a showing under the second part of the Catlett test that in prosecuting him the government had an improper purpose or motive sufficient to

warrant a hearing on his selective prosecution claim.

For his required showing, Eklund depends on numerous government documents, whose authenticity has been conceded by the government, which he submitted with his motion. Our analysis of the motion and documents leads us to conclude that Eklund has not made a showing sufficient to raise a reasonable doubt as to the government's purpose in prosecuting him and hence to require a further evidentiary hearing. We have reached this conclusion after considering three grounds cited by Eklund to show discriminatory enforcement: the government's delay in implementing a broader enforcement system, statements contained in government memoranda, and the participation of high-level executive officials in the formulation of prosecutive policy.

(a) Failure to implement a broader system

Eklund argues that the government, without undue administrative burden, could have adopted an enforcement system that would have been more inclusive and nondiscriminatory, and that its failure to do so is prima facie evidence of an improper motive. Eklund does not contend that the government was required from the outset to have in place a means to identify non-registrants other than those who had expressed opposition to draft registration. He does maintain, though, that impermissible motivation for using the passive system, even initially, may be inferred from the government's tardiness in implementing an active enforcement system. We are unconvinced by the evidence Eklund adduced to support this argument.

The documents submitted with Eklund's motion reveal that government officials considered the use of both active and passive enforcement systems. In a memorandum to

Attorney General Smith, dated July 14, 1981, D. Lowell Jensen noted that Selective Service was still "exploring ways to develop an 'active' enforcement system." There were impediments to implementation of an active enforcement system, however. It was not until December 1981, after Eklund's name had been referred to the Department of Justice for investigation, that 50 U.S.C. App. § 462 was amended to authorize the Secretary of Health and Human Services to provide Selective Service with Social Security data for use in an active identification process. Department of Defense Authorization Act, 1982, PL 97-86, Title IX, § 916(b), 95 Stat. 1099, 1129 (1981) (codified at 50 U.S.C. App. § 462(e)). This bill had been pending in Congress since the spring of 1981, having first been considered by the Senate on May 14, 1981. See 1981 U.S. Code Cong. & Ad. News 1781. The President requested the nec-

essary Social Security data early in 1982. Many addresses obtainable from Social Security files were obsolete, though, and when the government sought to acquire more reliable address information from the IRS, its efforts were rebuffed. Thus in the latter part of 1982 Selective Service implemented an alternative data-matching sysem using state driver's license records.

We view the government's decision to develop the passive enforcement system against both the backdrop of the government's intention ultimately to prosecute a greater number of non-registrants and the problems encountered in its efforts to implement an active enforcement system. If the evidence indicated that the government had no plans to pursue an enforcement program of wider scope than the passive enforcement system, we might agree with Eklund that he had established a genuine question concerning the government's

motive so as to warrant a hearing. In this case, however, the uncontradicted evidence shows that the government embarked on a long-range program to identify offenders, both vocal and silent, and prosecute them. As a consequence, we do not believe that Eklund has raised a reasonable doubt that the government's purpose in using its passive enforcement system was to select for prosecution on the basis of protected expression. We are therefore unwilling, merely on the basis of the evidence adduced by Eklund, to infer wrongful government motive.

What is more, Eklund has not shown that the passive system was implemented in a way which trenched on First Amendment values. It appears that enforcement measures against the non-registrants proceeded because they had not complied with the law, not because their views were unacceptable to government officials. None of the documents adduced by

Eklund suggest that the decision to prosecute an identified non-registrant was based on his expression of opposition to draft registration. Once the individual's name came to the government's attention the prosecutive mechanism was engaged. When Selective Service did not obtain Eklund's registration as a result of its letter to him, his name was submitted to the Justice Department. Eklund's name, along with several others, was sent by the Justice Department to the United States Attorney for the Southern District of Iowa. Eklund was the only one of these individuals who qualified for prosecution. Two of them registered, one was a woman, and others had moved from the district. The initiation and prosecution of the charge against Eklund was in harmony with Justice Department policy. Under that policy, Eklund was given ample opportunity to register and thus to avoid prosecution, but he refused to

do so. The Justice Department focused on the individual's failure to register, not on his views, as described in a Justice Department memorandum: "[I]f a non-registrant registers prior to indictment no further prosecutive action will be taken." Memorandum from Jensen to United States Attorneys, July 9, 1982, infra. In addition, an Assistant United States Attorney made a professional statement that Eklund was not singled out for prosecution from among possible defendants and that presentation of Eklund's case to the grand jury was based on the strength of the case against him.

(b) Statements of government officials

A June 30, 1982 memorandum from Assistant Attorney General D. Lowell Jensen to F. Henry Habight II, Special Assistant to Attorney Smith, regarding indictments of non-registrants contains the following statement:

'Before 3:00 p.m. we anticipate that

> a grand jury in the Southern District of California (San Diego) will return an indictment against an individual for failing to register with the Selective Service System....
>
> This matter and the other non-registrant matters currently under investigation by the Department of Justice are the result of either alleged non-registrants' reporting themselves or third parties reporting them to Selective Service. Consequently the first prosecutions are liable to consist of a large sample of persons who object on religious and moral grounds and persons who publicly refuse to register. (emphasis supplied in Eklund brief)

This language appears in a July 9, 1982 memorandum from Mr. Jensen to United States Attorneys:

> Our prosecutive policy requires that United States Attorneys notify non-registrants by registered mail that, unless they register within a specified time, prosecutions will be considered. In most instances we anticipate that Federal Bureau of Investigation agents will also interview alleged non-registrants prior to the initiation of prosecutions. Nevertheless, if a non-registrant registers prior to indictment, no further prosecutive action will be taken.

> The [passive enforcement] policy is designed to ensure that (1) the refusal to register is willful and (2) only persons who are the most adamant in their refusal to register will be prosecuted. The negative aspect of the policy is that if it becomes public, its provisions may act as a disincentive, until the last possible moment, to registration. Consequently, we request that United States Attorneys refrain from publicly disclosing policy concerning Selective Service non-registrant prosecutions. (emphasis supplied Eklund brief)

An earlier memorandum of July 6, 1981, from David J. Kline, Senior Legal Advisor, Criminal Division, to Lawrence Lippe, Chief, General Litigation and Legal Advice Section, contains the following:

> 5. The general prosecutive policy for the first wave of referrals should be as follows:
>
> a. All persons brought to our attention by Selective Service should be penalized if they should have registered.
>
> b. All those who register between the time of referral to the Department of Justice and indictment should be offered the opportunity to participate in the pretrial diver-

sion programs.

c. Those who refuse to register should be prosecuted.

Eklund relies principally on the emphasized portions of these excerpts, as well as similar language which appears in other documents adduced by him, and contends that the government consistently recognized that "all men whose names have been referred for prosecution -- and therefore all men in fact prosecuted -- will have protested against the draft and draft regisatration: the system cannot operate in any other manner." Appellant's Brief at 33 (emphasis in original). We disagree. The cited passages suggest only an awareness on the part of government officials that the class of persons prosecuted under the passive enforcement system would be heavily populated with vocal offenders. Awareness by government officials of this effect does not, without more, compel the inference that the prosecutions which resulted under

this policy were motivated by the non-registrants' exercise of constitutional rights. Moreover, in context the government's policy that "only persons who are the most adamant in their refusal to register will be prosecuted" is related to its policy of offering non-registrants ample opportunity to register. Hence under this policy only those men who refuse to register when offered repeated chances to do so, i.e., those who are "adamant in their refusal," are prosecuted.

We are likewise unwilling to accept Eklund's assertion that only vocal protestors could and would be prosecuted under the passive system. The passive enforcement system was clearly designed to apply to nonvocal as well as to vocal offenders. Eklund has not shown that the government declined to prosecute known silent offenders, nor has he shown that the government pursued prosecution of

any vocal offender who registered tardily. He argues only that impermissible motive is evidenced by the government's choice initially to focus its enforcement policy upon those offenders whose names came to its attention either through their own action or the action of third persons. This argument flies in the face of precedent from this court, however. The government would naturally be motivated to prosecute those men who made public their violation of the law. Because of the publicity given such violators, failure to do so would only encourage others to violate the law. As a consequence, it is well established in this circuit that absent bad faith, selectivity based upon the amount of publicity a prosecution will receive falls well within the exercise of prosecutorial discretion. United States v. Catlett, supra, 584 F. 2d at 868; United States v. Ojala, 544 F. 2d 940, 944-45 (8th Cir. 1976); see also

United States v. Scott, 521 F. 2d 1188, 1195 (9th Cir. 1975), cert. denied, 424 U.S. 955 (1976). As this court stated in United States v. Ojala, supra, 544 F. 2d at 945, with respect to a tax protestor:

> The government lacks the means to investigate and prosecute every suspected violation of the tax laws. Selection based in part upon the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws, which depend substantially upon a system of voluntary disclosure and reporting. It is difficult to conceive of a more legitimate object of prosecution than one who exploits his own public office and reputation to urge a political position by announcing publicly that he had gone on strike against the tax laws of the nation. (footnotes omitted)

Many of the considerations in Ojala also apply here. The record reflects the government's concern that delay in prosecuting non-registrants would adversely affect the registration program. The record also suggests that the prosecutions of non-registrants to date have been highly publicized.

The statements made by government officials, taken in context, indicate that those officials were attempting to avoid selective prosecution problems, not to create them. For instance, Assistant Attorney General Jensen advised the Selective Service:

> In order to avoid the risk of initial losses of non-registrants cases and the probable consequences of diminishing registrations, we believe that Selective Service must create a program of active identification which will be a functioning, or well on the way toward functioning, at the time of the first non-registrant prosecution.

Letter From D. Lowell Jensen to Herbert C. Puscheck, Associate Director, Plans and Operations, Selective Service System (March 2, 1982), quoted in United States v. Wayte, 549 F. Supp. 1376, 1384 (C.D. Cal. 1982). Eklund points to the government's failure to implement a broader enforcement policy to support an inference of selective prosecution from the statements in the documents. As we have indicated above, however, ample justification

for the delay in implementing a broadly based active enforcement system appears within the documents submitted by Eklund.

(c) Participation of high-ranking government officials

Finally, Eklund relies upon the participation of the Presidential Military Manpower Task Force (Task Force) in the decisions regarding prosecution of non-registrants. The Task Force included, among others, the Counselor to the President, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Director of Selective Service.

We are unwilling to infer improper motivation from the participation of high government officials in the formulation of the prosecution policy. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their officials duties." United States v. Chemical Found-

ation, Inc., 272 U.S. 1, 14-15 (1926); cf. Brewer v. United States, 353 F. 2d 260, 263 (8th Cir. 1965), quoting Gallego v. United States, 276 F. 2d 914, 917 (9th Cir. 1960). There is absolutely no indication that those high level officials intended to base the decision to prosecute on an individual's expression of opposition to the draft. The documents indicate that the Justice Department cautiously chose to avoid designating the districts in which the first prosecutions for failure to register would be commenced. Eklund concedes that no evidence that he was able to produce showed that he or any other individual was specifically targeted for prosecution. Surely it is not remarkable that high-ranking executive officials participated in formulating a policy for enforcement of laws pertaining to national security interests and involving hundreds of thousands of offenders, especially since it was contem-

plated that other executive agencies, specifically the IRS and the Social Security Administration, would become involved in the enforcement process.

(d) Summary

In our view Eklund's arguments on the selective prosecution issue fail to address the conclusions to be drawn from examination of the government's prosecutive policies as a whole. The record shows that Eklund was prosecuted because he refused to register for the draft, apprised the authorities of his refusal, volunteered to be prosecuted, and declined gratuitously offered opportunities to escape prosecution by registering. Eklund does not contend that Catlett is not controlling in this case, and we have no occasion to alter our rules for evaluating claims of selective prosecution in our resolution of his case. Hence, because he has not raised a reasonable doubt concerning the government's

purpose in prosecuting him, Eklund has not made he showing necessary under Catlett which would entitle him to a hearing on his claim of selective prosecution. Eklund has not shown that his prosecution flowed from a motive on the part of the government to prosecute him on the basis of the exercise of First Amendment rights. Indeed, First Amendment values were not threatened, implicated, or involved ir his prosecution.

B. Continuing Offense

(a) Construction of 50 U.S.C. App. § 462(d)

The district court held that 50 U.S.C. App. § 462(d) imposes a duty to register with the Selective Service which extends beyond the prescribed registration period and thus makes failure to register a continuing offense. 551 F. Supp. at 969. Consequently, commission of the offense of failue to register would continue for as long as the individual remains unregistered and under the

age of 26. Eklund contends, however, that any violation of the law arising from his failure to register was a completed offense at the expiration of the six-day period established for registration by Presidential Proclamation 4771, and that his failure to register after this period could not constitute a violation of the law, or provide any basis for prosecution. He argues accordingly that the government was required to prove that he was located within the Southern District of Iowa during the prescribed six-day period to establish both venue and a duty on his part to register within that district. In addition, he maintains that the government was required to prove that his failure to register during the six-day period was willful. Eklund contends that the government did not meet its burden of proving his presence in the district and willfulness during the six-day period and that consequently the

evidence is insufficient to support his conviction. If failure to register is a continuing offense, however, it is beyond question that the evidence is sufficient to support the guilty verdict.

The duty to register for the draft is imposed by 50 U.S.C. App. § 453(a), which provides in pertinent part:

> [I]t shall be the duty of every male citizen of the United States ... who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

The United States Supreme Court, in Toussie v. United States, 397 U.S. 112 (1970), held that section 453(a) did not impose a continuing duty to register, and hence that failure to register did not constitute a continuing offense. Toussie had

failed to register within the six-day period beginning on his eighteenth birthday, as prescribed by presidential proclamation, or at any later time. He was indicted for failing to register eight years later, shortly before he reached age 26. Since at the time failure to register was governed by the general five-year statute of limitations, 18 U.S.C. § 3282, the issue was when that statute began to run. That issue, in turn, depended on when the offense of failing to register was complete. The Court noted that an offense should not be construed as a continuing one "unless the explicit language of the criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." 397 U.S. at 115. The Court also examined this country's administration of its draft laws and concluded that, historically,

"registration was thought of as a single, instantaneous act to be performed at a given time, and failure to register at that time was a completed criminal offense." Id. at 117. The Court found that Congress had not expressed its intent that failure to register be a continuing offense, id. at 120, and further determined that the nature of the crime of failing to register did not make it a continuing offense. Id. at 122. The effect of the Toussie decision was that, since the indictment had not been handed down within the five-year statute of limitations period which began running six days after Toussie's eighteenth birthday, he was free of any possible penalty for his failure to register for the draft at the age of 23.

With but but one minor exception section 453(a) remains unchanged since the Toussie decision, and Eklund thus invokes Toussie in support of his contention that his failure to

register after the six-day period is not a basis for criminal liability. Eklund's reliance on Toussie does not take into account Congress' swift response to the decision. In 1971 it enacted P.L. 92-129, Title I, § 101(a)(31), 85 Stat. 348, 352 (1971) (codified at 50 U.S.C. App. § 462(d)), which provides that a person may be prosecuted for failing to register for the draft as late as five years after he attains the age of 26:

> No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title [section 453 of this Appendix] unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur.

Id. It is, of course, a commonplace that "it is the duty of a court in construing a law to consider the circumstances under which it was

passed and the object to be accomplished by it." United States v. Anderson, 76 U.S. (9 Wall.) 56, 65-6 (1869). The early response of Congress to the Toussie opinion is thus an important indication of its intention to change the law upon which Toussie was based.

Eklund contends that section 462(d) serves only to extend the statute of limitations to a maximum period of 13 years and should not be construed as altering the substance of the offense of failing to register. To be sure, section 462(d) refers to "the duty of registering imposed by section 3 of this title [section 453 of this Appendix]" which the Supreme Court construed in Toussie as a "single, instantaneous act to be performed at a given time." 397 U.S. at 117. The government, on the other hand, urges that the language of section 462(d) mandates the conclusion that Congress intended section 462(d) to establish a

continuing duty to register, and to establish that failure to register is a continuing offense which extends beyond the six-day period set for registration. In resolving this conflict, we must bear in mind that matters of military policy are particularly within the purview of congressional decision-making, and the courts should respect the power given Congress to legislate regarding military matters. See Rostker v. Goldberg, 453 U.S. 57, 64-67 (1981).

Eklund relies on the "rule of lenity," a principle of statutory construction which provides that criminal statutes must be strictly construed, and any ambiguity resolved in favor of lenity, citing United States v. Enmons, 410 U.S. 396, 411 (1973). Nevertheless, "[t]he Court has emphasized that the 'touchstone' of the rule of lenity 'is statutory ambiguity.' See e.g. Lewis v. United States, 445 U.S. 55, 56, 65 (1980).

Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent." Bifulco v. United States, 447 U.S. 381, 387 (1980) (emphasis added). The rule of lenity is to be applied "only when we are uncertain about the statute's meaning and [is] not to be used 'in complete disregard of the purpose of the legislature.'" Scarborough v. United States, 431 U.S. 563, 577 (1977), quoting United States v. Bramblett, 348 U.S. 503, 510 (1955). Moreover, the rule of lenity "cannot provide a substitute for common sense, precedent, and legislative history." United States v. Standard Oil Company, 384 U.S. 224, 225 (1966). Hence, "Congress' lack of precision in drafting legislation should never be an instrument for defeating or frustrating the manifest purpose annd intent of Congress, as revealed by the legislative history." Premachandra v. Mitts, 727 F. 2d

717, 727 (8th Cir. 1984). In numerous cases the Supreme Court has examined the legislative history of criminal statutes to aid in interpretation. See, e.g., Scarborough v. United States, supra, 431 U.S. at 577 ("history is unambiguous and the text consistent with it"). Accordingly, we now turn to an examination of the language of section 462(d) and its legislative history.

In our view the language of section 462(d) compels the conclusion that the duty to register is a continuing one, thus supplying the indication of congressional intent found lacking by the Supreme Court in Toussie, and that failure to fulfill that continuing duty is a continuing offense. Section 462(d) refers explicitly to the duty to register imposed by section 453. The two sections are thus linked together and in combination they impose the duty to register and define the contours of the obligation.

Because the two sections relate to the same subject matter, they should both be taken into consideration in construing either of them "as if they were one law." United States v. Freeman, 3 How. 556, 564 (1845). The latter part of section 462(d) specifies that the five-year period of limitation begins to run on "the last day before such person does perform his duty to register." The statute thus indicates that the duty continues after expiration of the period specified by proclamation for registration and provides an incentive for tardy registration before age 26.

If the duty to register does not continue after the original registration period, however, it would be impossible for a man to perform that duty tardily and thus gain the benefit of the shortened limitations period provided by section 462(d). Unless the duty is a continuing one, its performance

could only be accomplished at a time before any violation of the law had been committed. A narrow interpretation of the duty would have the effect of perpetuating the Toussie Court's characterization of the duty, which Congress by enacting section 462(d) sought to change. We conclude that the language used in the latter part of section 462(d), giving recognition as it does to a "person" who indeed "does perform his duty to register," contemplates that the duty is a continuing one, for to interpret the statute otherwise would render part of it ineffective. "It is well established that statutes will not be interpreted as though Congress enacted superfluous provisions." Conway County Farmers Association v. United States, 588 F. 2d 592, 598 (8th Cir. 1978). We thus find that a continuing duty to register is implicit in section 462(d) and that accordingly a breach of the duty

constitutes a continuing offense.

Further, with respect to the continuing offense question, section 462(d) imposes a five-year limitations period that, for a person who never registers, does not begin to run until the person reaches age 26. As noted, however, the limitations period begins to run upon late registration before age 26. A statute of limitations does not normally begin to run until the offense is complete. Toussie v. United States, supra, 397 U.S. at 115; Pendergast v. United States, 317 U.S. 412, 418 (1943). We believe in this case the converse is also true, and that the offense is not complete until the statute of limitations begins to run. Since the times at which the limitations period begins to run are firmly established by section 462(d), we may determine when the offense is complete by identifying the beginning of the running of the limitations period. We thus conclude it

is implicit in the limitations mechanism of section 462(d) that failue to register is a continuing offense.

We next look to the legislative history to ascertain whether Congress intended by enactment of section 462(d) to make failure to register a continuing offense. Cf. United States v. Cores, 356 U.S. 405, 409-10 (1958) (legislative history consistent with interpretation that alien crewman's willfully remaining in United States is continuing offense for venue purposes). Our conclusion based on analysis of the language of section 462(d) is strongly supported by its legislative history.

Section 462(d) was proposed by the Selective Service System which saw the amendment as a way of making the duty to register a continuing one, given the Court's reluctance to imply a continuing offense in the face of Congressional silence. See

United States v. Toussie, supra, 397 U.S. at 120. The Director of the Selective Service System, Dr. Curtis W. Tarr, testified that "the only thing at issue here is whether the Congress wants to make the requirement for registration a continuing requirement...." Extension of the Draft and Bills Related to the Voluntary Force Concept and Authorization of Strength Levels: Hearings Before the House Committee on Armed Services, 92d Cong., 1st Sess. 165 (1971). He also testified before the Senate Committee on Armed Services:

> Many of you are aware of the problems introduced by the Toussie case, in which the Supreme Court decided that a man who had failed to register for the draft at age 18 no longer was liable for that failure if Federal authorities did not indict him within 5 years. I feel certain that Congress expected the requirement to register at 18 to be a continuing requirement. The language we have proposed for a change in the law would overcome the weakness in the present law as interpreted recently by the Supreme Court. (emphasis added)

Selective Service and Military Compensation: Hearings Before the Senate Committee on Armed Services, 92d Cong., 1st Sess. 74 (1971).

The conclusion that the Selective Service System viewed section 462(d) as establishing a continuing duty to register is buttressed by the fact that on September 2, 1972, it amended its regulations and eliminated the language imposing a continuing duty to register found in 32 C.F.R. §1611.7(c), in effect at the time of the Toussie decision. 37 Fed. Reg. 17,963 (1972). Before the Toussie decision several courts of appeals had held in reliance on this continuing duty regulation that failure to register was a continuing offense. See McGregor v. United States, 206 F. 2d 583, 584 (4th Cir. 1953); Gara v. United States, 178 F. 2d 38, 40 (6th Cir. 1949), aff'd by an equally divided Court, 340 U.S. 857 (1950);

Fogel v. United States, 162 F. 2d 54, 55 (5th Cir.), cert. denied, 332 U.S. 791 (1947). The rescission of 32 C.F.R. § 1611.7(c) following enactment of section 462(d) indicates that Selective Service believed it was no longer necessary to rely on its regulations to find a continuing duty to register and a continuing offense upon failure to do so. Current Selective Service regulations merely recognize that persons will perform their duty by presenting themselves for registration at times other than the fixed day or days. 32 C.F.R. § 1615.2 (1983).

To be sure, present Selective Service regulations made effective July 18, 1980, do not contain a provision imposing a continuing duty to register. 45 Fed. Reg. 48,130 (1980) (codified at 32 C.F.R. §§ 1615.1-1615.9). The Court held in Toussie, however, that the continuing duty regulation then in effect

could not be relied upon to make failure to register a continuing offense. 397 U.S. at 121. Thus the Court held that the regulation was not sufficient to make failure to register a continuing offense. Similarly, we conclude that neither is the existence of such a regulation necessary to find that failure to register is a continuing offense. It would be contrary to the reasoning of Toussie to make the determination whether failure to register is a continuing offense turn on the existence or nonexistence of an administrative regulation. Toussie supports the proposition that whether an offense is a continuing one is for Congress to determine, and not contingent on administrative regulations. Id.

Section 462(d) is phrased as a statute of limitations because it was the issue of limitation of prosecution with which Congress

was presented as a result of Toussie. It is clear, however, that the purpose of section 462(d) went beyond merely setting forth the applicable statute of limitations. By enacting section 462(d) Congress sought to remedy what it saw as an inequity created by the Toussie decision between those who registered and those who did not. Registration is a precondition to induction, Rostker v. Goldberg, supra, 453 U.S. at 75, and hence Congress concluded that as a result of Toussie a man who did not register was not only immune from prosecution beginning the sixth day after his twenty-third birthday, but was also immune from induction beginning the sixth day after his eighteenth birthday. In contrast, a man who fulfilled his duty to register was subject to induction until age 26. The basis for the Supreme Court's decision in Toussie was that Congress had not clearly expressed an intention that

the duty to register be considered a continuing one. In acting to remedy the inequity it perceived, Congress sought to express its intent that the duty to register be considered a continuing one. Accordingly, Congress enacted a wholly new limitations period provision which in our view accomplished its purpose by imposing a continuing duty to register and making the failure to do so a continuing offense.

Support for our conclusion appears throughout the legislative history of section 462(d). Concerning H.R. 6531, the House Committee on Armed Services reported:

> Clause 23 of Section 1 of the bill amends Section 12 of the Military Selective Service Act by adding a new Subsection (d) extending the period before which the Statute of Limitations begins to run in order to permit prosecution of draft evaders until the age of 31.
>
> The language added here provides that the Statute of Limitations does not begin to run until the last day before the date on which a man registers or on the

> date on which he attains age 26, whichever occurs first. For a non-registrant this will allow prosecution for five years after his 26th birthday. This change is approriate not only as a device to emphasize the continuing requirement of registration but also as a reflection of equity to those men who comply with the registration requirements and remain liable until age 26.

H.R. Rep. No. 82, 92d Cong., 1st Sess. 17 (1971) (emphasis added). In S.R. No. 93, 92d Cong., 1st Sess. 22 (1971), reprinted in 1971 U.S. Code Cong. & Admin. News, 1439, 1455-56, the following discussion was included:

> The House version included a provision recommeded by the Administration by adding a new subsection 5(d) which will overcome the result of Toussie v. United States, 90 S. Ct. 858 (1970). That opinion interpreted the Act to limit the time for prosecuting men who fail to register to five years and five days after a man's 18th birthday. The Committee language will allow the prosecution of a nonregistrant up to five years after his 26th birthday. It does not change the statute of limitations for any other violation of Selective Service law. This change is deemed appropriate not only as a deterrent to nonregistration but also as a

> reflection of equity to those men who comply with the Act's registration requirements and remain liable at least to age 26. (emphasis added)

In much of the debate preceding the enactment of P.L. 92-129, it is apparent that members of Congress were of the view that the purpose of section 462(d) was to make the duty to register a continuing one, and failure to register a continuing offense, and thus to remedy the inequity created by Toussie. On June 7, 1971, Senator Gravel offered an amendment, Amendment No. 122, deleting the provisions of section 462(d) from the bill. 117 Cong. Rec. 18444 (1971). In offering his amendment, Senator Gravel stated: "I rise to speak in opposition to amending the present Selective Service Act so as to make failure to register under it a continuing offense." Id.

Speaking in opposition to the amendment, Senator Byrd, a member of the Armed Services

Committee, replied:

> Amendment No. 122 would continue to perpetuate what the House of Representatives feels and what the committee felt is an inequity and which the committee bill sought to end. The committee bill, in effect, declares that an individual has a continuing responsibility to register with the Selective Service until the age of 26. Consequently, if at the age of 26 a young man has failed to fulfill his responsibility to register, the 5-year statute of limitations will begin to run and the registrant would be liable for prosecution until the age of 31.

Id. at 18445 (emphasis added).

Senator Byrd later stated:

> The Supreme Court in Toussie v. United States, 397 U.S. 112 (1970) interpreted congressional intent as being that failure to register is a single act.
>
> ...
>
> Consequently, it ruled that prosecution could not take place once a registrant reached the age of 23 years, 5 days. Amendment No. 122 would uphold the Court's reading of congressional intent and would perpetuate the inequity created by it. For instance, if a young man does not register ... when he is eighteen and remains unnoticed until after his 23rd birthday, he is not

> subject to prosecution.... And if he has not registered, he certainly could not be inducted into the Armed Forces.
>
> Meanwhile, the individual who complies with the law by registering ... is liable for induction to age 26. Amendment No. 122 would only continue to perpetuate this inequity which the committee bill sought to end. The committee bill, in effect, declares that an individual has a continuing responsibility to register....

Id. at 18446 (emphasis added).

Sentor Stennis, Chairman of the Armed Services Committee, stated:

> Here are two young men living on opposite sides of the street. They become 18 years of age on the same day. One goes down to the proper place and registers according to law. He responds to his draft board and does everything they tell him to do. If he is sent to Vietnam, he goes.
>
> The young man on the other side of the street decides not to register, and does not do so in the intervening 8 years until he is 26 years old. He disappears somewhere, in some way. He does not obey anything....
>
> That is what we call in law a continuing offense. He continues to

> be liable to register, but the statute of limitations barring prosecution will not begin to run until his 26th birthday. It runs 5 years further.
>
> ....
>
> .... This principle of a continuing crime is basic law. The matter of deferment has nothing to do with it.
>
> The Supreme Court decision said that the congressional intent was not clear. Therefore, it said he could not be prosecuted after 5 years. We want to make congressional intent clear to the effect that he is not going to be relieved from being punished 5 years after this 18th birthday.

Id. at 18769-71 (emphasis added).

Finally, Senator Thurmond, also a member of the Armed Services Committee, stated:

> The provision that such statute of limitations begins at age 26 was proposed by the Selective Service System in the present legislation and has been approved by the House of Representatives and recommended by the Senator Armed Services Committee.
>
> The Supreme Court in Toussie v. United States, 397 U.S. 112 (1970) interpreted congressional intent as being that failure to register is a

> single act.... Mr. Gravel's amendment would uphold the Court's reading of congressional intent and would perpetuate the inequity created by it.
>
> ...
>
> ... The committee bill, in effect, declares that an individual has a continuing responsibility to register with selective service until age 26.
>
> Thus, if at age 26 the young man has failed to fulfill his responsibility to register, the 5-year statute of limitations would begin to run and the registrant would be liable for prosecution until age 31.

Id. at 18770 (emphasis added).

After the debate, Senator Gravel's amendment was rejected by a vote of 63 to 15. Id. at 18771.

The House also considered and rejected an amendment to H.R. 6531, introduced by Congressman Mikva, that would have stricken the language of section 462(d). See 117 Cong. Rec. 9005-9007 (1971). As was Senator Gravel, Congressman Mikva was concerned with

the lengthy period of exposure to prosecution contemplated by section 462(d). Nonetheless, Congressman Mikva expressed his understanding that the duty to register should be a continuing one:

> Let me also make clear that nothing in my amendment would limit the person's continuing obligation for the draft through age 26 like anybody else. I am not suggesting that they should get any bootstrap benefits by failing to register.

Id. at 9006. In response to another member's comment, Congressman Mikva replied:

> The gentleman is not suggesting that the man at the age of 23 is free of his obligation to register. Of course, that continues until his 26th birthday.

Id. Similarly, Congressman Arends, a co-sponsor of H.R. 6531, see id. at 7641, remarked, "[A] man is liable for registration from age 18 to age 26." Id. at 8636.

These excerpts supply a consistent and clear indication of Congressional intent that the duty to register be a continuing one, and

thus provide the expression of congressional intent the Court found lacking in Toussie. Eklund seeks to separate the continuing duty to register from the issue whether failure to register is a continuing offense, arguing that the references in the legislative history to a continuing duty are ambiguous and thus insufficient to reach the level of certainty required by Toussie before a continuing offense can be inferred. He contends that failure to perform a continuing duty does not necessarily give rise to a continuing offense, arguing that, for instance, failure to file a timely tax return is not a continuing offense even though Congress provides a legal incentive for the tardy performance of that duty and thus contemplates the obligation to perform it is a continuing one. He also points to the fact that Congress apparently never considered the ramifications of making the failure to

register a continuing offense, other than in the statute of limitations context.

As the foregoing discussion indicates, however, we do not characterize the legislative history as ambiguous and inconsistent. As we noted earlier, it is clear that Congress, in enacting section 462(d), was reacting to the Supreme Court's determination in Toussie that failure to register was not a continuing offense. This intent is evidenced by the very language of the provision Congress enacted. The language of section 462(d) is consistent with our interpretation of its legislative history. Moreover, the language of section 462(d) can be given full effect only when interpreted in harmony with the intent of Congress to make failure to register a continuing offense. Ante at 19-20. It is also clear that Congress' reaction was motivated by a desire to devise an efficient and fair registration

scheme, rather than, as Eklund's theory suggests, to effect punishment of non-registrants. We conclude that Congress obviously sought to establish a continuing duty to register, and intended that failure to comply with this continuing duty be treated as a continuing offense. While it is true that Congress did not discuss the impact of its action on proof of venue and willfulness, there is no requirement that it have done so. The effects on venue and proof of willfulness about which Eklund complains flow normally from the act of establishing failure to register as a continuing offense.

We observe finally that even prior to enactment of section 462(d) the Supreme Court in Toussie noted that the government's posited construction of section 453, as imposing a continuing duty to register, was not without some support. Toussie, supra, 397 U.S. at 116. The Supreme Court's

decision in Toussie stemmed largely from the lack of clear expression of congressional intent. 387 U.S. at 120. Congress has now provided a clear expression of intent.

(b) Due Process

Eklund next contends that if we construe section 462(d) as establishing that failure to register is a continuing offense, the provision is then impermissibly vague because it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954). We disagree. The continuing duty concept implicit in section 462(d) admittedly is not as clearly expressed as it could be. Nevertheless, as the Supreme Court stated in United States v. Powell, 423 U.S. 87, 94 (1975) quoting United States v. Pretillo, 332 U.S. 1, 7 (1947), "[t]he fact

that Congress might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague."

The Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972), described three important values offended by vague laws: (1) "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," (2) that those charged with enforcing the laws be guided by explicit standards, to prevent arbitrary and discriminatory enforcement, and (3) that the exercise of First Amendment freedoms not be inhibited. Only the first value involving fair warning is brought into question by Eklund in this case. We conclude that the statute gives fair warning. As our earlier discussion indicates, we believe that

the continuing duty and continuing offense concepts are implicit in the wording of section 462(d). We conclude that the statute is not prejudicially vague. In reaching this conclusion, we rely in part on the fact that one who fails to register must "knowingly" do so before he is guilty of an offense. 50 U.S.C. App. § 462(a). In Hoffman Estates v. The Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982), the Supreme Court noted that "the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."

C. Improper Promulgation of Proclamation 4771 and Implementing Regulations

(a) Proclamation 4771

Eklund contends that Presidential Proclamation 4771 was void for lack of compliance with the notice and comment requirement of 50 U.S.C. App. § 463(b). The

proclamation specified the dates for registration; if the proclamation was invalid, there would be no duty to register. Section 463(b) provides in part as follows:

> [N]o regulation issued under [the Selective Service] Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Federal Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his view to the Director on such regulation, but no formal hearing shall be required on any such regulation.

Eklund argues that although section 463(b) refers only to "regulations," the terms "proclamation" and "regulation" should be considered interchangeable. The government argues on the other hand that Proclamation 4771 was not subject to the notice and comment requirement of section 463(b), citing United States v. Wayte, 710 F. 2d 1385 (9th Cir. 1983).

We agree with the conclusion expressed by the court in Wayte:

> Section 453 of the Selective Service Act provides that men shall register at that time and place and in that manner "determined by proclamation of the President and by rules and regulations prescribed hereunder." 50 U.S.C. App. § 453(a) (emphasis added). In light of Congress' reference to proclamations and regulations in that section, its § 463(b) reference to regulations alone indicates that proclamations do not fall within the notice and comment requirement.

Id. at 1388-89. Accordingly, we reject Eklund's contention.

(b) Selective Service Regulations

Finally, Eklund contends that Selective Service regulations implementing the registration program were promulgated without sufficient public notice, and that consequently the indictment should be dismissed. He cites the 60-day notice and comment period for proposed regulations imposed by the Director of Selective Service, 43 Fed. Reg. 50,980, 50,981 (1978), and

points to the fact that the regulations in question, 32 C.F.R. §§ 1615.1-1615.9 (1980), were issued in final form on July 18, 1980, see 45 Fed. Reg. 48,130, only 32 days after notice of the proposed regulations was published on June 16, 1980. See 45 Fed. Reg. 40,577. We agree with the court in United States v. Wayte, supra, 710 F. 2d at 1389, that the 60-day notice and comment period requirement was imposed in accordance with Executive Order 12044, 43 Fed. Reg. 12,661, 12,662 (1978), which is judicially unenforceable. See Independent Meat Packers Association v. Butz, 526 F. 2d 228, 234-36 (8th Cir.), cert. denied, 424 U.S. 966 (1976).

The judgment of the district court is affirmed.

LAY, Chief Judge, dissenting, with whom HEANEY, McMILLIAN and ARNOLD, Circuit Judges,

join.

I respectfully disagree with the majority's analysis in both the Eklund and Martin cases that §§ 453(a) and 462(d) of Title 50 U.S.C. provide a continuing duty to register for the draft. The difficulty I have with the majority's analysis is that it misinterprets the significance of several factors. I have no difficulty with the extended discussion of the legislative history, nor as to what Congress thought it was doing when it amended the statute of limitations. The Supreme Court held in Toussie v. United States, 397 U.S. 112 (1970), that Congress did not intend failure to register under 50 U.S.C. App. § 453 to be a continuing offense because the five-year statute of limitations, then existing, was to begin when the crime was completed. There should be little doubt that Congress set out

to change the result in Toussie, that is, to amend the statute of limitations in order to allow prosecution of the failure to register for the draft on a continuing basis.[1] The problem is that the majority allows the congressional history to override the plain meaning of the statute.

Three significant factors compel the conclusion that, at the time Martin[2] and

---

[1] In addition to overruling Toussie, Congress's purpose in extending the statute of limitations was to provide equitable treatment to registrants, who were subject to induction until age 26. As Senator Byrd recognized:

> [T]he purpose of this is not to take punitive action but to prevent what the selective service people feel, what the House of Representatives evidently thought, and what the committee feels is presently discriminatory, in that it in effect allows a 23 year old who has violated the law to be free from both prosecution and military service, while the law-abiding young man remains eligible for induction until he is 26. Most people felt that was discrimination in the present law. That is the purpose of the change. Whether that discriminatory aspect should be changed, of course, is debatable; but that was the purpose of it, not to be punitive, but to do away with what the House felt and the committee felt is discriminatory at the present time.

117 Cong. Rec. 18,445-46 (1971).

[cont'd. on next pg]

Eklund[3] were indicted, no continuing duty to register existed. First, at the time Toussie was decided, there existed a regulation under the Act which provided: "The duty of every person subject to registration ... shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration...." 32 C.F.R. § 1611.7(c).

Second, the congressional debates reflect that, at the time Congress sought to amend the statute of limitations in order to allow prosecution for failure to register as a continuing event, Congress was well aware that the regulation establishing a continuing duty to register was still in existence. See

---

[2] Martin was indicted on October 5, 1982.

[3] Eklund was indicted on August 31, 1982.

generally 117 Cong. Rec. 18,438-47 (1971). The congressional debates simply recognized the need to extend the statute of limitations to give effect to the continuing duty regulation then in existence.

And third, at the time Eklund and Martin were charged for failing to register, not only had the regulation establishing a continuing duty to register been eliminated, but when new regulations were promulgated in 1980, they did not include a continuing duty to register. Cf. 32 C.F.R. § 1615 (1982).

At the time of the amendment extending the statute of limitations, 32 C.F.R. §1611.7 was still in effect. In order to alter the result in Toussie, Congress passed § 462(d):

> No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title [section 453 of this Appendix] unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years

> next after the last day before such person does perform his duty to register, whichever shall first occur.

It is clear from the majority's discussion of the congressional debates that Congress sought to extend the statute of limitations, and thus to change the result of Toussie, by giving effect to the then existing regulation which made nonregistration a continuing offense.[4] The

---

[4] The majority appears to assert that Toussie rendered any regulations promulgated by the Selective Service ineffective. Supra at 23. However, Toussie itself anticipated and rebutted this interpretation.

Although at the time of the Toussie opinion, the regulation existed making the duty to register a continuing one, the Supreme Court held that "this regulation should not be relied upon effectively to stretch a five-year statute of limitations into a 13-year one." Toussie, 397 U.S. at 121. Justice White's dissent contended that the majority was holding the regulation to be without authority. Id. at 127. However, Justice Black responded in footnote 17 that Justice White's interpretation was not correct. Justice Black observed:

> It is significant that the courts that have concluded that failure to register is a continuing offense have done so by relying explicitly on the regulation. See Fogel v. United States, [162 F. 2d 54, 55 (5th Cir.), cert. denied, 332 U.S. 791 (1947)]; McGregor v. United States, [206 F. 2d 583, 584 (4th Cir. 1953)]; Gara v. United States,

[cont'd. on next pg]

Supreme Court stated in Toussie that any criminal offense should not be construed as a continuing one "unless that statute itself ... justifies that conclusion."[5] Toussie,

---

[178 F. 2d 38, 39 (6th Cir. 1949), aff'd by an equally divided Court, 340 U.S. 857 (1950)]; and the opinions below in this case, 280 F. Supp., at 474, 410 F. 2d, at 1157. It is equally significant that the only court that concluded that the offense was not a continuing one did so at a time when there was no "continuing-duty" regulation issued to implement the registration provisions. United States v. Salberg, [287 F. 208 (N.D. Ohio 1923)], interpreting the 1917 Draft Act, held that failure to register was not a continuing offense. The first continuing-duty regulation was promulgated in 1941.... These decisions support our conclusion that the statute itself, apart from any reliance on the administrative regulation, does not require that it be construed to incorporate a continuing-offense theory. We do not hold, as the dissent seems to imply, ... that the continuing duty regulation is unauthorized by the Act. All we hold is that neither the regulation or the Act itself requires that failure to register be treated as the type of offense that effectively extends the statute of limitations.

Id. at 121 n. 7 (emphasis added) (citations omitted).

[5] It is clear that Congress knows how to make words explicit and provide for a continuing duty. At the time of the 1971 amendment to the Act, legislation existed which stated that "any registrant who has failed or refused to report for induction shall continue to remain liable for induction." 50 U.S.C. App. § 454 (1970) (emphasis added).

397 U.S. at 121 (emphasis added).

We then turn to the substantive provisions of § 453. The statute reads:

> § 453. Registration.
>
> [I]t shall be the duty of every male citizen of the United States ... who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 U.S.C. App. § 453(a) (emphasis added).

At the times Eklund and Martin were charged for failing to register, the proclamation of President Carter issued on July 2, 1980, provided in pertinent part as follows:

> 1-1. Persons to be Registered and Days of Registration.
>
> 1-101. Male citizens of the United States and other males

> residing in the United States, unless exempted by the Military Selective Service Act, as amended, who were born on or after January 1, 1960, and who have attained their eighteenth birthday, shall present themselves for registration in the manner and at the time and places as hereinafter provided.
>
> 1-102. Persons born in calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980.

Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 7624-25. It should be clear that the Presidential Proclamation did not make the offense a continuing one. It is precise and limits the time for registration of an 18 year old male to six days beginning July 21, 1980.

The Act recognizes as well that the Director of the Selective Service System may promulgate "rules and regulations" as to the time and place to register.[6] 50 U.S.C. App. § 453(a). Following the amendment to the

statute of limitations, on April 1, 1975, President Ford discontinued the procedures for registration under the Military Selective Service Act. Proclamation No. 4360, 40 Fed. Reg. 14,567 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 2490. When President Carter reactivated the draft process on July 2, 1980, he issued Proclamation No. 4771 ordering registration of young men. It is significant that on July 18, 1980, three days before registration was to begin, regulations were published governing the administration of the registration. 45 Fed. Reg. 48,130 (1980) (codified in 32 C.F.R. § 1615). Noticeably absent from those regulations was any continuing duty regulation. Cf. 32 C.F.R. 1615.

---

[6] Equally significant here, as it was in Toussie, is the Supreme Court's observation that "from the Selective Service System's viewpoint the process of registration is a 'continuing' one. But from the registrant's viewpoint the obligation arises at a specific time." Toussie, 397 U.S. at 119.

The government argues that the reason the regulation was not reenacted and that Toussie may now be disregarded is that Congress by amending the statute of limitations had provided a continuing duty to register. The government provides no authority for this statement. Furthermore, the reasoning proffered to support this statement is critically flawed. There is nothing in § 462(d) which sets forth the time period during which a young man must register other than a reference back to § 453. Section 453 is the substantive offense and refers specifically to the time and place, "as shall be determined by Proclamation of the President" and the promulgated rules and regulations.[7] Thus, the Presidential

[7] Under the majority's analysis I wonder how a court would solve the following hypothesis: Suppose the President by Proclamation or the Selective Service by regulation stated that registration should take place within six days after the registrant's 18th birthday and that the duty to register would continue for one year thereafter. Would the Proclamation or [cont'd. on next pg]

Proclamation requiring registration within six days of July 21, 1980, defines the period during which Eklund's and Martin's failure to register occurred. The government's position to the contrary ignores the plain wording of the statute.

CONCLUSION

If the intent of Congress was purposely to make the substantive offense of failure to register a continuing duty, Congress had an obligation to make that duty explicit and understandable. Toussie, 397 U.S. at 113. There is not one word or sentence in the Act itself, in the Presidential Proclamation, or in the regulations that requires a registrant to register beyond the times specified in the President's Proclamation. When a statute is

---

regulation, which is specifically referred to in §453, then control or would the majority's interpretation of § 463(d) as requiring a continuing duty to register for eight years control? The absurdity of it all is that under the majority's analysis the Proclamation or regulation would be read out of the statute.

explicit and narrowly sets out the specific time period in which registration is required, I think we should apply the plain wording of the statute as it exists. Regardless of the length of time in which a prosecution may proceed, substantive provisions of the Act clearly delegate to the President and the Selective Service Administration authority to specify the time and place for registration.

I therefore dissent.*

HEANEY, Circuit Judge, dissenting, with whom LAY, Chief Justice, and McMILLIAN and ARNOLD, Circuit Judges, join.

Registration for the draft is an important obligation of citizenship. The Justice Department has the duty to prosecute

---

* I concur in Part C of the majority opinion.

those who evade that obligation. It obviously does not have the resources to prosecute each of the estimated 674,000 young men who have failed to register. It can, however, be held accountable for developing and implementing a neutral process for selecting those it prosecutes. In my view, Gary John Eklund presented sufficient evidence to take the question of whether the government selected him for prosecution because he exercised his first amendment rights past the frivolous stage. He raised a reasonable doubt concerning the government's motive. He thus met the standard required to justify an evidentiary hearing on selective prosecution as set forth in Catlett.

A review of the evidence concerning the government's selection process shows that Eklund met his burden for a preliminary evidentiary hearing:

First, he offered to prove an

impermissible motive through memoranda indicating that Justice Department officials knew the effect of the passive enforcement system would be to prosecute persons "who object on religious and moral grounds and persons who publicly refuse to register." In one official's words, "the chances that a quiet non-registrant will be prosecuted is [sic] probably about the same as the chances that he will be struck by lightning." See United States v. Wayte, 549 F. Supp. 1376, 1384 (C.D. Cal. 1982), reversed, 710 F. 2d 385 (9th Cir. 1983).

Second, he offered to prove that the government had an adequate opportunity to develop reasonable, alternative methods of enforcement. President Carter reinstated draft registration in July, 1980, and no one was indicted for non-registration until the summer of 1982. Thus, even excluding President Reagan's grace period from January

7, 1982 through February 28, 1982, the government had two years to develop a fair random selection system before it requested any indictments. The reasons offered by the government to excuse its delay in implementing an active selective system are inadequate. While the Selective Service System did not have statutory authority to use social security data until December, 1981, state drivers license records have apparently been available during the entire period in question, and Selective Service did not need statutory authority to use these records. Failure to use them earlier is not explained in this record. Further, the government's argument that the existence of some obsolete addresses in the social security list renders the entire list useless is not supported by the record. Developing a fair and random system does not require finding addresses for all 674,000 non-

registrants. The social security numbers, names and birthdates (which can never be obsolete) could be matched against the draft registration list, and yield a far greater pool of non-registrant names than resulted from the passive system. Address problems could be dealt with after a valid sampling from this pool.

Third, the record suggests the passive system was itself implemented in a discriminatory manner.[1] Selective Service had the names of 134 non-registrants as of June, 1981. These individuals had either reported themselves or were reported by third persons. Selective Service sent warning letters to 103 of these non-registrants; the 31 others had "inadequate addresses." Of the 103 cases:

---

[1] This evidence is found in the record of United States v. Martin, No. 82-2425, which was also before us in this appeal.

-- 16 responded by writing that they were refusing to register;

-- 45 did not reply;

-- 37 warning letters were returned undelivered; and

-- 5 had unknown delivery status.

Selective Service forwarded the files on all 134 of these cases to the Justice Department (which sent them to the respective United States Attorneys' offices). As of September, 1982, only 13 non-registrants had been indicted. The United States conceded in United States v. Schmucker, 721 F. 2d 1046, 1049 (6th Cir. 1983), that these 13 men had written letters refusing to register.[2] It also appears that the government did not prosecute or otherwise pursue the cases of the 45 men who did not reply to the warning letters, or the 37 men whose warning letters

[2] Our record contains an affidavit stating that each of the first eight non-registrants indicted had written the government refusing to register, and had publicly protested draft registration.

were returned undelivered. These men were known non-registrants. Apparently the moral of the government's policy is: if you want to evade the draft registration law, do nothing, say nothing, and you will not be prosecuted. Only those with the courage and candor to write the government refusing to register will be punished. This fact alone is enough to shed reasonable doubt on the government's motives.

The majority contends that government awareness of a discriminatory impact differs from a discriminatory motive, and that ultimately the government's enforcement system did not impinge upon the defendant's first amendment rights. I respectfully disagree. The evidence of the government's knowledge of a discriminatory impact certainly casts a reasonable doubt on its selection motive, which under Catlett is sufficient to justify an evidentiary

hearing. Moreover, knowledge of this impact is even more suggestive of an impermissible motive when coupled with evidence ofthe government's awareness of a reasonable, alternative enforcement method.

The majority concludes that enforcement measures against non-registrants were based on their noncompliance with the law, not on the government's view that the defendant's ideas on registration were unacceptable. The fact is, however, that the government did not proceed against non-registrants generally, but focused on those who communicated their refusal to register to the government. The defendants' communicated refusal and their consequent prosecution are too closely interconnected. In United States v. Schmucker, supra, 721 F. 2d at 1049, the Sixth Circuit explains why the passive enforcement system impinges upon first amendment rights:

> It selects for prosecution only those who speak out against the law. It selects people based on their expression of beliefs and the strength of their convictions. It excludes, and therefore rewards, thousands who engage in covert noncompliance and evasion of the law, including all those who would confess their violation if sought out and interviewed. It discourages dissenters from expressing their criticisms of government policy.

The circuits are divided on the selective prosecution issue raised in this appeal. The Ninth Circuit agrees with the majority, United States v. Wayte, 710 F. 2d 385 (9th Cir. 1983).[3] Our position finds support in the Sixth Circuit decision of United States v. Schmucker, supra, and in United States v. Falk, 479 F. 2d 616 (7th Cir. 1973) (sufficient showing made that prosecution for draft card violation was based on defendant's status as vocal Vietnam

---

[3] This dissent is consistent with the dissent in Wayte. We would add that Wayte appears to be inconsistent with United States v. Steele, 461 F. 2d 1148 (9th Cir. 1972).

war draft protestor; remanded for evidentiary hearing).

I thus conclude that Eklund met his burden of making a non-frivolous showing of selective prosecution, entitling him to further discovery and a full evidentiary hearing on the question. He should be permitted an opportunity to discover and offer further evidence, and to question appropriate government officials concerning:

-- memoranda or statements with respect to the expected effect of the passive selection method;

-- the decisions affecting implementation of an active selection system which would have included inadvertent and intentional, but quiet non-registrants;

-- detailed information with respect to each of the 134 non-registrants.

Because the majority opinion does not afford defendant this evidentiary hearing, I

must dissent.

A true copy.

Attest:

CLERK, UNITED STATES COURT OF APPEAL, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 82-2425

UNITED STATES OF AMERICA, Appellant, v. RUSSELL JAMES MARTIN, a/k/a RUSTY MARTIN, Appellee.	Appeal from the United States District Court for the Northern District of Iowa

Submitted: September 2, 1983
Filed: May 4, 1984

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, J.R. GIBSON, FAGG, and BOWMAN, Circuit Judges,

---

FAGG, Circuit Judge.

Russell James Martin was indicted for failing to register with the Selective Service System in violation of 50 U.S.C. App. §§ 453(a) and 462(a). The indictment charged

in pertinent part:

> Beginning on or about July 27, 1980, and continuing until on or about August 20, 1982, ... Russell Martin ... did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration....

Martin moved to dismiss the indictment, claiming among other points that the offense of failing to register with the Selective Service System was not a continuing offense as charged by the indictment. The district court agreed that the offense was not a continuing one, and struck as surplusage the phrase "and continuing until on or about August 20, 1982." United States v. Martin, 557 F. Supp. 681, 686 (N.D. Iowa 1982). The government has filed a pre-trial appeal. We reverse.

I. Jurisdiction.

The government appealed on the authority of 18 U.S.C. § 3731, which provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. (emphasis added).

Martin contends that the district court's order did not dismiss the indictment as to any one or more counts, but instead struck language from the one-count indictment as surplusage, and that consequently this court lacks jurisdiction of the appeal.

The word "count" found in section 3731 has been interpreted as referring to "any discrete basis for the imposition of criminal liability that is contained in the indictment." United States v. Sanabria, 548 U.S. F. 2d 1, 5 (1st Cir. 1976), rev'd on other grounds, 437 U.S. 54 (1978); see also United States v. Margiotta, 646 F. 2d 729, 731-32 (2d Cir. 1981), cert. denied, 103 S.

Ct. 1891 (1983); United States v. Marubeni American Corp, 611 F. 2d 763, 764-65 (9th Cir. 1980); United States v. Alberti, 568 F. 2d 617, 621 (2d Cir. 1977). The government contends failure to register is a continuing offense and that a discrete basis for criminal liability arises each day the failure continues.

Martin seeks to distinguish his case from the cases cited by the government on the ground that each of those cases involves the dismissal of allegations of separate offenses upon which separate convictions could have been obtained. See United States v. Margiotta, supra, 646 F. 2d at 731-32 (separate mailings alleged in mail fraud indictment); United States v. Marubeni American Corp., supra, 611 F. 2d at 764 (court struck forfeiture demand from single count which alleged violation of 18 U.S.C. § 1962(c) [RICO)); United States v. Alberti,

supra, 568 F. 2d at 620 (court struck certain specifications of perjury from a single count); United States v. Sanabria, supra, 548 F. 2d at 3-4 (numbers activity and horse betting alleged in single count). Martin argues that even if failure to register is a continuing offense, there is no discrete basis of criminal liability because failure to register constitutes but one offense. Under this argument the absence of separate offenses requires the conclusion that there is no discrete basis of criminal liability.

In our view, that part of the indictment struck by the district court provides a discrete basis of criminal liability. If the government is correct in its theory that failure to register is a continuing offense, it could prosecute Martin for his failure to register during the initial six-day registration period and his continuing failure to register after that time. Even

though the government could not obtain separate convictions for the violation, Martin's alleged conduct after the six-day period provides a discrete basis for prosecution grounded on the proposition that failue to register is a continuing offense. The district court's order "in effect has dismissed a substantial part of the single count; this amounts to dismissal of a substantial part of the indictment." United States v. Alberti, supra, 568 F. 2d at 621. We have jurisdiction to entertain this appeal concerning the separate basis for prosecution included in the language struck by the district court.

Our result is consistent with he principles that section 3731 is to be construed liberally. The last paragraph of the statute provides that "[t]he provisions of this section shall be liberally construed to effectuate its purposes." The Supreme

Court noted in United States v. Wilson, 420 U.S. 332, 337 (1975), that "the legislative history [of section 3731] makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." Martin concedes that there is no constitutional impediment to the present appeal. We consider our exercise of jurisdiction over this appeal a fulfillment of the meaning and purpose of section 3731.

II. Continuing Offense

The district court found that the offense of failing to register was not a continuing one, and struck the language from the indictment which charged a continuing offense. In United States v. Eklund, No. 82-2505, a companion case decided on this same day, we hold that failure to register is a continuing offense. We therefore reverse and

remand with directions to reinstate the language stricken from the indictment.

In arguing that failure to register is not a continuing offense, Martin raises an issue not raised by Eklund in appeal No. 82-2505; he argued that a continuing duty would compel the late registrant to incriminate himself in violation of the Fifth Amendment, and that 50 U.S.C. § 453(a) and 462(d) should be interpreted so as to avoid such a constitutional problem. We reject this argument for the reasons set forth in United States v. Toussie, 410 F. 2d 1156, 1159-60 (2d Cir. 1969), rev'd on other grounds, 397 U.S. 112 (1970).

Reversed and remanded for proceedings consistent with this opinion.

LAY, Chief Judge, dissenting, with whom HEANEY, McMILLIAN and ARNOLD, Circuit Judges, join.

I would dissent from the above opinion on the ground set forth in my dissent in United States of America v. Gary John Eklund, No. 82-2505.*

A true copy.

Attest:

CLERK, UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

---

* I concur in Part I of the majority opinion.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CRIMINAL NO. 82-77
GARY JOHN EKLUND, Defendant.	)	MEMORANDUM OPINION

Defendant has been found guilty by a jury of the offense of willfully failing to register with the Selective Service System in violation of 50 U.S.C. App. §§ 453(a) and 462(a).[1] He is scheduled to be sentenced

[1] § 453. Registration.
(a) [I]t shall be the duty of every male citizen of the United States ... who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and byrules and regulations prescribed hereunder.

§ 462. Offenses and penalties.
(a) ... any other person charged as herein provided
[cont'd. on next pg]

December 2, 1982.

On October 15, 1982, the court entered oral rulings in open court on numerous

---

with the duty of carrying out any of the provisions of this title [sections 451 to 471a of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty ... or who otherwise evades or refuses registration ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections] ... shall, upon conviction in any district court of the United States of competent jurisdiction, be punished ...

Pursuant to section 453 on July 2, 1980, President Carter issued Proclamation No. 4771 providing in part:

1.1 Persons to be Registered and Days of Registration.

1-101. Male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, as amended, who were born on or after January 1, 1960, and who have attained their eighteenth birthday, shall present themselves for registration in the manner and at the time and places as hereinafter provided.

1-102. Persons born in calendar year 1960 shall present themselves for registrtion on any of the six days beginning Monday, July 21, 1980. [Defendant was born in 1960.]

defense motions, and in the instructions to the jury on October 27 the court made further determinations of contested legal issues. This memorandum opinion articulates the court's reasoning in respect to two of the more seriously contested issues: (1) whether defendant is the victim of impermissible selective prosecution, an issue he raised by motion to dismiss; and (2) whether the offense charged is a continuing offense, an issue defendant raised by motion to dismiss, requested instructions ad objections to the court's instructions. The court ruled that defendant is not the victim of impermissible selective prosecution and that the offense charged is a continuing one.

SELECTIVE PROSECUTION

Facts

In July of 1980, when the Selective Service System registration requirement went into effect, defendant participated in a public demonstration against registration at the United States Post Office in Des Moines. He spoke at the demonstration, stating that he would not register. News reporters were present and his remarks were quoted in a Des Moines Register news story about the demonstration.

In January of 1981 defendant wrote to the Selective Service System expressing his opposition to involuntary military service. He stated: "Last July I did not sign up for future involuntary induction (into the military) as the law required and I will not do so in the future." He went on to volunteer "to be the first [prosecuted for non-registration]."

In June of 1981 defendant received from the Selective Service System a letter fully advising him of the provisions of the registration requirement, including the criminal penalties for non-registration. A registration form was enclosed. The letter stated in the concluding paragraph: "Let me stress that unless we hear from you within 15 days of the date of this letter we will send your name to the Department of Justice for investigation and possible persecution."

In October of 1981 the defendant received from the United States Attorney for the Southern District of Iowa a letter similar to the June letter, granting him ten days to register. A registration form was enclosed.

On August 24, 1982, an FBI agent personally delivered another letter, written by an Assistant United States Attorney for the Southern District of Iowa and similar to

the prior letters, to defendant at his father's residence in Davenport. Enclosed with the letter was a registration form. The letter did not fix a deadline. Defendant was also given a booklet concerning registration. Defendant told the FBI agent that he had not registered and did not plan to register. Defendant was indicted on August 31.

On July 28, 1982, the Selective Service System Director estimated before a subcommittee of the House Judiciary Committee that there are about 674,000 non-registrants out of a potential registrant population of 9,039,000. He opined that only a relatively small number of non-registrants have "knowingly" neglected to register.

The Selective Service System's enforcement program is "passive." Non-registrants are brought to the Service's attention only when they report themselves

(as defendant did) or when others report them. The identifies of non-registrants are not actively sought.

The Selective Service System expects to soon implement an "active" enforcement program based on access to Social Security records.[2] Selective Service System officials expect that the "active" enforcement program will result in referral to the Justice Department of massive numbers of non-registrants and that selection of persons to be prosecuted will probably be based on a

---

[2] On December 1, 1981, 50 U.S.C. App. § 462 was amended to add subsection (e), which states:

> The President may require the Secretary of Health and Human Services to furnish to the Director, from records available to the Secretary, the following information with respect to individuals who are members of any group of individuals required by a proclamation of the President under section 3 [section 453 of this Appendix] to present themselves for and submit to registration under such section: name, date of birth, social security account number, and address. Information furnished to the Director by the Secretary under this subsection shall be used only for the purpose of the enforcement of this Act.

random system.

Under the "passive" system, which yielded defendant's name when he wrote Selective Service in January of 1981, a name required is passed on to the Justice Department after the individual is sent the letter that defendant received in June of 1981. In describing the "passive" system's operational experience, the Director of the Selective Service System told a subcommittee of the House Judiciary Committee on July 28, 1982:

> Since mid-1980, we have received the names of about 1,000 potential violators; some of these are self-admitted; that is, they are individuals who have written or called Selective Service and stated their intention to refuse to register. The other names were submitted to us by parents, neighbors and other concerned citizens. We receive about ten additional names each week. In processing these names we check our registration files, correspond with the man and analyze all responses. As a result we have identified 225 probable violators from this list and have forwarded these names to

> the Department of Justice for investigation and/or prosecution. This effort is continuous and will result in additional referrals in the near future.

The Justice Department prosecution policy, as set forth in a July 9, 1982, communication to United States Attorneys from the Justice Department

> requires that United States Attorneys notify non-registrants by registered mail that, unless they register within a specified time, prosecutions will be considered. In most instances we anticipate that Federal Bureau of Investigation agents will also interview alleged non-registrants prior to the initiation of prosecutions. Nevertheless, if a non-registrant registers prior to indictment, no further prosecutive action will be taken.
>
> The policy is designed to ensure that (1) the refusal to register is willful and (2) only persons who are the most adamant in their refusal to register will be prosecuted.

The Justice Department sent to the United States Attorney for the Southern District of Iowa names of possible violators

believed to be living in the district. Of the names sent, two registered, one proved to be a woman not subject to registration, and others had moved out of the district. Defendant is the only one who could be prosecuted. The only names evaluated by the United States Attorney for the Southern District of Iowa for possible persecution for non-registration were those referred by the Justice Department.

The first indictments for failure to register under President Carter's Proclamation No. 4771 came last summer after a lengthy grace period. Defendant was among the first eight persons indicted.

Law Governing Selective Prosecution

The due process clause of the Fifth Amendment prohibits the federal government from denying to any person within its jurisdiction the equal protection of the laws. Bolling v. Sharpe, 347 U.S. 497

(1954).

In United States v. Falk, 479 F. 2d 616, 618 (7th Cir. 1973), the court stated:

> The promise of equal protection of the laws is not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws. The basic principle was stated long ago in Yick Wo v. Hopkins, 118 U.S. 356, 373-374, 6 S. Ct. 1064, 1073, 30 L. Ed. 220 (1886):
>
> > "Though the law itself be fair on its face and impartial in appearace, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

However, mere "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962).

The United States Court of Appeals for this circuit articulated the burden on a

defendant alleging unconstitutional selective prosecution in United States v. Catlett, 584 F. 2d 864, 866 (8th Cir. 1978):

> To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion, or his exercise of his first amendment right to free speech. United States v. Berrios, 501 F. 2d 1207, 1211 (2d Cir. 1974). We approved of this two-pronged test of "intentional and purposeful discrimination" in United States v. Swanson, 509 F. 2d 1205, 1208-09 (8th Cir. 1975). See also United States v. Ojala, supra, 544 F. 2d at 943.

Discussion

The thrust of defendant's position is that the government's "passive" enforcement system operates to identify and prosecute only those non-registrants who exercised their First Amendment right to speak out in

opposition to the draft registration law, and therefore the prosecutions of defendant and the few others who have been prosecuted to date are impermissibly based on their exercise of the First Amendment right to free speech. Defendant established that he was singled out for prosecution while others similarly situated (most other willful non-registrants who could be identified by an "active" enforcement program) have not been prosecuted. However, defendant did not establish the second essential element of selective prosecution -- that his selection for prosecution was based on an impermissible ground.

Although the government's "passive" enforcement system may pick up names of some individuals who have exercised their First Amendment right to free speech by publicly speaking out against the draft registration law, there is no showing that the selection

of these people for prosecution was based upon their exercise of the First Amendment right to free speech. Defendant has not demonstrated that he is being prosecuted because he has expressed his opposition to the draft registration law. The undisputed evidence shows that defendant is being prosecuted because he purposely identified himself to the Selective Service System as a non-registrant and has persisted in refusing to register by rejecting repeated opportunities to register that were offered to him by the government. There is no showing that people who have publicly expressed their opposition to the draft registration law, but who have not identified themselves or been identified by others to the Selective Service System as non-registrants, are being prosecuted for non-registration or for any other crime. One may publicly speak out against the law without

identifying himself as a violator, indeed without even being a violator, and one may identify himself to Selective Service as a violator without publicly speaking out against the law.

Defendant misinterprets the statement in the Justice Department's July 9, 1982, communication to United States Attorneys that "[t]he policy is designed to ensure that ... 2) only persons who are the most adamant in their refusal to register will be prosecuted" to mean that the policy is designed to prosecute only those who publicly express opposition to the law. That is not what is meant. What is clearly meant, as reference to the preceding paragraph of the communication shows, is that only those who persist in not registering after personally being given every opportunity to do so will be prosecuted. (See pertinent text of the communication at page 5 of this memorandum

opinion.)

If the government's prosecution program consisted of actively seeking out and prosecuting only those who had publicly spoken out against the registration law, the selective prosecution defense might have merit. However, that is not the government's policy. The policy is to prosecute those willful non-registrants whose names are supplied to the Selective Service System by the non-registrants themselves or other members of the public and who persist in refusing to register after being given repeated government invitations to do so. These persons are prosecuted whether or not they have made public speeches against the registration law. Those who did make such speeches did not thereby gain immunity from prosecution.

The selective prosecution issue in the current draft registration cases has not yet

been addressed by federal appellate courts. The weight of district court authority supports this court's conclusion. United States v. Martin, No. CR 82-2005 (N.D. Iowa Nov. 19, 1982) (order); United States v. Sasway, No. 82-8504-GT (S.D. Cal. Aug. 19, 1982) (order); United States v. Schmucker, No. 82-133A (N.D. Ohio 1982). Contra United States v. Wayte, No. CR 82-630-TJH (C.D. Cal. Nov. 15, 1982) (order and opinion).

CONTINUING OFFENSE[3]

In 1970, the United States Supreme Court held in Toussie v. United States, 397 U.S. 112 (1970), that the offense of failing to register was not a continuing offense, and that therefore the statute of limitations began to run when the offense began to run when the offense was completed by defendant's failure to register during the six days designated in the President's proclamation. The limitations statute then in effect was the regular five year statute, 18 U.S.C. § 3282. Defendant's conviction was reversed because the statute had run.

---

[3] The continuing offense issue arose in the context of the government's burden of proving all elements of the crime. If the offense were not continuing, the government would have had to prove that all elements, including knowledge on the part of defendant of his duty to register, existed during the six-day period in July of 1980. See n. 1, supra. Under the court's holding that the offense is a continuing one, the government was permitted to prove existence of all the elements at any point in time from July 1980 until indictment in August in 1982.

A year later, in direct response to the Toussie decision, the Congress enacted Public Law 92-219, now codified as subsection (d) of 50 U.S.C. App. § 462, a statute of limitations provision that is applicable only to failure to register violations. This law provides:

> No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title [section 453 of this Appendix] unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur.

For the following reasons, it is this court's opinion that subsection (d) of section 462 imposes a continuing duty to register until age 26 and makes the offense a continuing one.

The language of the statute expressly recognizes that one who failed to register

during the days designated in the presidential proclamation may "perform his duty to register" (emphasis supplied) at a later date. The statute also fixes the duration of the limitatiions at five years and provides that the five year period does not begin to run until the non-registrant reaches age 26 or registers, whichever occurs first.

"The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." Toussie v. United States, supra, 397 U.S. at 114. Normally a statute of limitations begins to run from the time the crime is complete, Pendergast v. United States, 317 U.S. 412, 418 (1943), but if the crime is a continuing one the statute does not begin to run until the continuous

commitment of the crime ceases. Toussie v. United States, supra, 397 U.S. at 114 ("If the offense is a continuing one the prosecution was timely ...."). Thus it appears that the express statutory language of section 462(d) is consistent only with the continuing offense concept.

The legislative history of section 462(d) offers support for the view that Congress intended the statute to establish the offense as continuing. House Report No. 92-82, 92d Cong. 1st Sess. 17 (1971), reflects the following comments:

> Clause 23 of Section 1 of the bill amends Section 12 of the Military Selective Service Act by adding a new Subsection (d) extending the period before which the Statute of Limitations begins to run in order to permit prosecution of draft evaders until the age of 31. The new Subsection will overcome the results of the decision in Toussie v. United States, 90 S. Ct. 858 (1970). The opinion in that case interpreted the act to limit the time for prosecuting a man who failed to register to five years and five days after a man's 18th

birthday. [Emphasis supplied.]

> The language added here provides that the Statute of Limitations does not begin to run until the last day before the date on which a man registers or on the date on which he attained age 26, whichever occurs first. For a non-registrant this will allow prosecution for five years after his 26th birthday. This change is appropriate not only as a device to emphasize the continuing requirement of registration but also as a reflection of equity to those men who comply with the registration requirements and remain liable until age 26. [Emphasis added.]

As for case law precedent, at least two other district courts have held that the offense is continuing. United States v. Sasway, supra; United States v. Schmucker, supra (jury instructions). Contra United States v. Martin, supra. Appellate courts have not yet directly ruled on the issue, but the United States Court of Appeals for the Third Circuit, in dictum, stated:

> Furthermore, the congressional action in amending the statute to reverse the effect of Toussie, see 50 U.S.C. App. § 462(d) (Supp.

> 1973), is a strong indication that the legislative intent was indeed to impose a continuing duty.
>
> ....
>
> ... The doctrine of continuing offense is not one foreign to our law and is not one we should hesitate to apply when congressional policy and the obvious necessity of making men available for military service on a continuing basis are fully consistent with such an interpretation.

United States v. Robinson, 485 F. 2d 1157, 1163 (3d Cir. 1973).

Finally, a constitutional consideration strongly favors construing section 462(d) as imposing a continuing duty to register until age 26 and making the offense a continuing one. It is a fundamental principle of statutory construction that if a statute is susceptible to two interpretations and one is of doubtful constitutionality, the other must prevail. St. Martin Evangelical Lutheran Church v. South Dakota, ___ U.S. ___, 101 S. Ct. 2142, 2147 (1981); CSC v. Letter

Carriers, 413 U.S. 548, 571 (1973); United States v. Vuitch, 402 U.S. 62, 70 (1971); Tollett v. United States, 485 F. 2d 1087, 1098 (8th Cir. 1973). The construction urged by defendant, that section 462(d) merely changes the duration of the statute of limitations but does not make the offense a continuing one, appears to offend the right of equal protection of the laws inherent in the due process clause of the Fifth Amendment. See Bolling v. Sharpe, supra.

If section 462(d) were not construed to make the offense of failing to register a continuing offense, it would impose a limitation of different durations for different people, the duration for each person depending on his date of birth. President Carter's Proclamation No. 4771 required those born in 1960 to register from July 21 through July 26, 1980, inclusive; those born in 1961 to register from July 28

through August 2, 1980, inclusive; those born in 1962 to register from January 5 through January 10, 1981 inclusive; and those born on or after January 1, 1963, to register from 30 days before to 30 days after their eighteenth birthday. For each offender the statute would begin to run the day after his prescribed registration period ended and, unless he tardily registered, would expire when he reaches age 31. The statute's length would vary among offenders, the length for each depending on his birthday. For those born in 1960 the length would vary from 10 years, 5 months and 5 days to 11 years, 5 months and 4 days. For those born in 1961 the length would vary from 11 years, 4 months and 29 days to 12 years, 4 months and 28 days. For those born in 1962 the length would vary from 11 years, 11 months and 21 days to 12 years, 11 months annd 20 days. For those born on or after January 1, 1963,

the length would be 12 years and 11 months. The total range is from 10 years, 5 months and 5 days (born 1-1-60) to 12 years, 11 months and 20 days (born 12-31-62). Any offender who tardily registered would have a statute of limitations length of 5 years plus whatever length of time lapsed from the day the statute began to run until the day he registered.

This court cannot identify any rational basis that would sustain such variations in the duration of the limitations against an equal protection challenge. If, however, section 462(d) is construed to impose a continuing duty to register until age 26, thus making the offense a continuing one, there is no constitutional problem. So construed, section 462(d) is simply a five year statute of limitations that begins to run when the offense ceases by attaining age 26 or registering, and its duration is

uniformly applicable to all offenders.

By enacting subsection (d) of section 462, Congress intended to and did make the offense of filing to register a continuing one.

DATED this 29th day of November, 1982.

HAROLD D. VIETOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR 82-2005
v.	)	ORDER OF NOVEMBER 19,1982 AS AMENDED
RUSSELL JAMES MARTIN, a/k/a RUSTY MARTIN,	)	
Defendant.	)	

On the court's own motion, for the convenience of the parties and simplification of the record,

It is

ORDERED

That this Court's order of November 19, 1982 as amended by its Order Nunc Pro Tunc of November 22, 1982 shall constitute the order as amended and read as follows:

This matter is before the court on defendant's six resisted motions to dismiss, filed October 29, 1982. Order in accordance

herewith.

On October 5, 1982, defendant was indicted by the Grand Jury for the Northern District of Iowa charging:

> Beginning on or about July 27, 1980, and continuing until on or about August 20, 1982, within the Northern District of Iowa, RUSSELL JAMES MARTIN, a male person required to present himself for and submit to registration pursuant to the Military Selective Service Act, rules and regulations duly made pursuant thereto and Presidential Proclamation No. 4771 of July 2, 1980, did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration in violation of 50 U.S.C. App. §§ 453 and 462(a).[1]

---

[1] § 453. Registration.
...
(a) [I]t shall be the duty of every male citizen of the United States ... who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and byrules and regulations prescribed hereunder.

§ 462. Offenses and penalties.
(a) ... any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451 to 471a of this Appendix], or
[cont'd. on next pg]

I.

In his "Motion to Dismiss Indictment for Alleging a Crime Which Does Not Exist or in

---

the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty ... or who otherwise evades or refuses registration ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections] ... shall, upon conviction in any district court of the United States of competent jurisdiction, be punished ...

...

Pursuant to § 453 on July 2, 1980 President Carter issued Proclamation No. 4771 providing in part:

1-1. Persons to be Registered and Days of Registration.

1-101. Male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, as amended, who were born on or after January 1, 1960, and who have attained their eighteenth birthday, shall present themselves for registration in the manner and at the time and places as hereinafter provided.

1-102. Persons born in calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980.

...

the Alternative to Strike Surplusage," defendant argues that the indictment is defective because it charges him with failing to fulfill his continuing duty to register, where no such duty or offense exists under the law. In the alternative he seeks to strike the continuing allegations as surplusage. The government's resistance maintains that failure to register is a continuing offense, i.e., one that continues to be committed each day that the defendant remains unregistered, but neither urges a variance nor resists the motion to strike.

An early history of the Military Selective Service Act and the draft laws is provided in Toussie v. United States, 397 U.S. 112, 116 (1970). As can be gleaned from the discussion therein, originally, there was no continuing duty to register because the Selective Service Act of 1917 provided that failure to register at the designated time

was a completed criminal offense. See, United States v. Salberg, 287 F. Supp. 208 (N.D. Ohio 1923). It wasn't until rules and regulations were promulgated under the Selective Service Act of 1940 that there arguably arose a continuing duty to register.[2] The regulation which created the continuing duty to register was later made part of the Military Selective Service Act. That regulation provided:

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

32 CFR 1611.7(c)

However, on September 2, 1972 the

---

[2] The regulation was first promulgated under the 1940 Act on June 4, 1941. Selective Service System Regulations Vol. 2, § IX, 205(d), 6 Fed. Req. 2747.

"continuing duty regulation" was rescinded and on March 29, 1975 President Ford discontinued the procedures for registration under the Military Selective Service Act. Presidential Proclamation No. 4360, 40 F.R. 14567 (1975). In early 1980, President Carter determined that it was necessary to reactivate the draft registration process, See, Rostker v. Goldberg, 453 U.S. 57, 60 (1980), and on July 2, 1980, he issued Proclamation No. 4771 (FN 1 above) ordering registration of certain young men.

On July 18, 1980, three days before registration was to begin, regulations were published governing the administration of registration. 45 F.R. 48130 (1980), codified in 32 CFR Part 1615. Noticeably absent from said regulations was any "continuing duty" regulation. 32 CFR 1611.7(c).

In 1970, the United States Supreme Court decided a statute of limitations question

arising under 50 U.S.C. App. §§ 453 and 462(a) of the Universal Military Training and Service Act. Toussie v. United States, 397 U.S. 112 (1970). In order to decide at what point the statute of limitations began to run, the court determined that it was necessary to initially ascertain whether or not the offense involved was a continuing one. The court noted that the doctrine of continuing offenses should be applied only in limited circumstances. Id. at 115. Significantly, a particular offense should not be construed as a continuing one, "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Id. at 115.

In an effort to ascertain the nature of the crime and the Congressional intent, the

court examined the substantive statute, the regulations and the history of the draft laws. The conclusion reached was that "there is nothing inherent in the nature of failing to register that makes it a continuing offense." Id. at 122. "While it is true that the regulation[3] does in explicit terms refer to registration as a continuing duty, we cannot give it the effect of making this criminal offense a continuing one." Id. at 121. The law requires that a man register within a specified period of time and if he does not register within that time, he then and there has committed the offense of failing to register. Id. at 119.

In United States v. Owens, 431 F. 2d 349 (5th Cir. 1970) defendant was required to register within five days of his eighteenth birthday. Defendant failed to register and

---

[3] 32 CFR 1611.7(c), supra at 2.

was indicted. The indictment charged defendant with failing to register on a date approximately fourteen months after the five day registration period had passed. Defendant alleged that the indictment was insufficient because it did not state a crime. The court disagreed, finding that 32 CFR § 1611.7(c) imposed upon defendant the continuing duty to register and that failure to so register was a crime. United States v. Owens, 431 F. 2d at 351. The court based its decision on the "continuing duty regulation" which it claimed had not been outlawed by Toussie. Id. at 351.

Similarly, in cases decided prior to Toussie, courts that have concluded that failure to register is a continuing offense have done so by relying explicitly on the regulation. See, Gara v. United States, 178 F. 2d 38, 39 (6th Cir. 1949), aff'd by an equally divided court, 340 U.S. 857 (1950);

McGregor v. United States, 206 F. 2d 538, 584 (4th Cir. 1953); Fogel v. United States, 162 F. 2d 54, 55 (5th Cir. 1947), cert. denied, 332 U.S. 791 (1947). As noted above, 32 CFR § 1611.7(c) was repealed in 1972 and no similar regulation has taken its place. Thus, if a continuing duty to register is to be found it must have its basis elsewhere.

In 1971, in direct response to Toussie, Congress enacted Public Law 92-129 (50 U.S.C. App. § 462(d) providing:

> (d) No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title [section 453 of this Appendix] unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such person does perform his duty to register, whichever shall first occur.

This section extends the statute of limitations for prosecution of non-registrants from age 23 to age 31. However,

the government maintains that it is clear from reading the legislative history of the statute and the subsequent case law that Congress, by enacting 50 U.S.C. App. § 462(d), intended to impose a continuing duty to register. The court cannot agree.

While it is evident that Congress intended to extend the statute of limitations by passing 50 U.S.C. App. § 462(d), it is far from evident that Congress intended to impose a continuing duty to register. The legislative history is brief, vague, incomplete and contains only one reference to a continuing requirement to register.[4] S.R.

---

[4] The lone reference to continuing requirement is contained in H.R. Rep. No. 92-82, 92d Cong., 1st Sess. 17 (1971) which provides in part:

> The language added here provides that the Statute of Limitations does not begin to run until the last day before the date on which he attained age 26, whichever occurs first. For a non-registrant this will allow prosecution for five years after his 26th birthday. This change is appropriate not only as a device to emphasize the continuing requirement of registration but also as a reflection of equity to those men who comply with the registration requirements and remain liable

[cont'd. on next pg]

No. 92-93, 92d Cong. 1st Sess. (1971), in U.S. Code Cong. & Admin. News 1455-6, 1458 and H.R. No. 92-82, 92d Cong. 1st Sess. 17 (1971). The court is not convinced that Congress "assuredly" intended that the duty to register be treated as a continuing one. Toussie, at 115. Had it so intended, Congress could have explicitly provided for the continuing duty as it did in 50 U.S.C. App. § 454.[5]

Moreover, the cases cited bythe government do not support finding a continued duty. In United States v. Richardson, 512 F. 2d 105 (3d Cir. 1975), contrary to the government's assertion, the court made no comment regarding the intent of Congress to impose a continuing duty to register by

---

until age 26.

5 Section 454 provides, "[A]ny registrant who has failed or refused to report for induction shall continue to remain liable for induction ..."

enacting 50 U.S.C. App. § 462(d). In referring to § 462(d) the court simply stated, "[T]he legislative history of the statute indicates that Congress wished to overcome the decision in Toussie ..." Id. at 106. Although Congress did overcome the result in Toussie, it did so by extending the statute of limitations, not by altering the nature of the offense so as to create a continuing duty to register.

In United States v. Robinson, 458 F. 2d 1157 (3rd Cir. 1973), another case cited by the government, the issue before the court was whether or not there was a continuing duty to report for induction. Although the court expressed its opinion that the enactment of § 462(d) indicated legislative intent to impose a continuing duty to register, it also noted that,

> Toussie was concerned only with the statute of limitations as it applied to the duty to register, and as to that obligation there is no

> comparable provision in the statute as does exist with respect to the duty to report for induction. (emphasis added) Id. at 1163.

In other words, what the Robinson court observed is that unlike § 454, neither § 453 or § 462 contain an explicit provision which provides that there is a continuing duty to register. This is particularly important in light of the fact that the regulations no longer provide for a continuing duty as they did at the time of the Toussie decision. Toussie requires explicit language in the substantive criminal statute before a continuing duty will be found. Toussie at 115. Moreover,

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear nd definite. We should not derive criminal outlawry from some ambiguous implication. United States v. Universal Corp., 344 U.S. 218, 221-222 (1952).

In construing a criminal statute this court cannot demand that a defendant refer to the legislative history of a statute of limitations to determine whether or not he might violate a substantive criminal law. Fundamental fairness of due process requires that no person be held criminally responsible for conduct he could not reasonably understand to be proscribed. United States v. Bass, 404 U.S. 336 (1971), see also, 21 Am. Jur. 2d Crim. Law § 16 et seq. (1981), 16A Am. Jur. 2d Const. Law § 818 (1979).

In the instant case, defendant was born on July 13, 1960. Pursuant to § 1-102 of Presidential Proclamation No. 4771, "Persons born in calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980." Thus, if defendant has committed any offense, it is that of failing to register on or between July 21, 1980 and July 26, 1980.

In United States v. Harmon, 486 F. 2d 363 (10th Cir. 1973) defendant was required by the pertinent regulations to register with the Selective Service on or within five days after attaining his eighteenth birthday. Defendant became 18 on March 18, 1970 but failed to register on or before March 23, 1970, five days after his birthday. Defendant was subsequently indicted and charged with failure to register between the dates of March 24, 1970 and March 2, 1972. Defendant sought to dismiss the indictment on the grounds that it did not charge him with a crime.

In considering defendant's claim the court interpreted the Toussie decision as finding no continuing offense and went on to caution that "a United States Attorney should think twice before he alleges the offense as a continuing one." Id. at 366. However, the court stopped short of dismissing the

indictment, noting that although the time allegations were superfluous, they would not void the indictment as long as the defendant was prosecuted within the limitations period. Id. at 366.

A variance between the date alleged in the indictment and the date of the commission of the offense will not be fatal, particularly "... where the allegation and proof substantially correspond or where the variance was not of a character which could have misled the defendant at trial." Id. at 366; Washington & Georgetown Railroad v. Hickey, 166 U.S. 521, 531 (1897).

In the instant case, defendant has alternatively moved to strike the "continuing" portion of the indictment to clear up any uncertainty as to what he will be expected to prove at trial, pursuant to FRCrP 7(d). Defendant does not claim to be misled or that he would be prejudiced if the

court sustained his motion to strike.

Therefore, the court finds that the law imposes no continuing duty to register beyond the period provided for in Presidential Proclamation No. 4771. The allegations in the indictment alleging a continuing duty to register will be stricken as surplusage. FRCrP 7(d).

II.

Defendant has filed a "Motion to Dismiss Indictment For Selective Prosecution and Request For Evidentiary Hearing." Defendant requests that the indictment be dismissed because: (1) he is being prosecuted after being "constructively registered," and (2) he is being prosecuted because he has been a public and vociferous spokesman against the Selective Service System and the draft. The government claims that defendant has failed to meet his burden proof and is therefore not entitled to an evidentiary hearing or

dismissal of the indictment. The court agrees with the government and denies defendant's motion.

In United States v. Catlett, 584 F. 2d 864 (8th Cir. 1978), a defendant who had been convicted of willfully failing to file income tax returns appealed his conviction. Defendant claimed that he had been selectively prosecuted on account of his public and notorious refusal to pay income taxes as part of his protest against the war and tax policies of the government. He was denied a pretrial hearing on this question. The court stated at p. 866:

> To establish the essential elements of a prima facie case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his

> exercise of his first amendment right to free speech. United States v. Berrios, 501 F. 2d 1207, 1211 (2nd cir. 1974).

Here, defendant is a known non-registrant who has publicly protested and expressed his disatisfaction with the registration process. Under the first prong adopted in Catlett defendant must demonstrate that others similarly situated have not been prosecuted for failing to register.

Although defendant has attached an abundance of exhibits to his memorandum in support of his motion, he has not provided any evidence that the government has failed to take steps to prosecute other known non-registrants, other vocal non-registrants or even non-vocal non-registrants. Without such a showing, defendant's selective prosecution claim will fail. See United States v. Ness, 652 F. 2d 890, 892 (9th Cir. 1981). United States v. Wilson, 639 F. 2d 500 (8th Cir. 1981).

Defendant has claimed, and the government has not resisted, that there are over 500,000 men who have failed to register for the draft. Due to the sheer numbers alone, it is evident that other non-registrants are not being prosecuted. However, as defendant acknowledges, the government has adopted a "passive enforcement" system. Other non-registrants similarly situated to the defendant are being prosecuted under that system. Thus, defendant has failed to show that he is being unfairly singled out for prosecution. See Catlett, 584 F. 2d at 866.

Having failed to meet the first prong of the selective prosecution test, the court finds that defendant is not entitled to dismissal of the indictment or to an evidentiary hearing. However, even assuming that defendant has met the first prong, he does not demonstrate that the selection of

him for prosecution was based on an impermissible ground, as required under the second prong.

Defendant alleges that he is being prosecuted because he is an outspoken opponent of registration and that this violates his First Amendment rights.

It is apparent that defendant came to the attention of the Selective Service and the Department of Justice because of his protest activities and letters which he sent government officials. However, as the court indicated in Catlett, supra that showing is not enough:

> In the instant case, a close examination of defendant's motions and suggestions reveals that he has failed to allege a governmental policy of selective prosecution based on an impermissible ground. The policy he attacks discriminates between nonfiling protestors whose protests receive publicity and nonfiling protestors whose protests do not receive publicity. Defendant's theory is not that he has been singled out for prosecution solely because he has protested the

> war and tax policies of the government. Rather, he objects to his prosecution only on the basis that he was selected due to the publicity his protests have received. The decision to prosecute, therefore, rests upon the amount of publicity one's protests receive, not upon the exercise of one's first amendment right to free speech. Such a decision is not based upon an impermissible ground but rather serves a legitimate governmental interest in promoting public compliance with tax laws. Id. at 868.

The government is clearly entitled to select those cases for prosecution which it believes will promote public compliance with the Selective Service registration laws. See, Catlett, 584 F. 2d at 868.

> While the decision to prosecute an individual cannot be made in retaliation for his exercise of his first amendment right to protest government [registration and draft policies], the prosecution of those protestors who publicly and with attendant publicity assert an alleged personal privilege [not to register] as part of their protest is not selection on an impermissible basis. Catlett, 584 F. 2d at 867.

If this court were to adopt defendant's

view, it would mean that future violators of the law could be able to avoid prosecution by speaking out on a particular issue and thereby drawing attention to themselves. However, the court will not do so particularly where, as here, defendant has not established a prima facie case of selective prosecution.

In light of the fact that defendant has refused to acknowledge that he was "constructively registered" (see letter to Major General Turnage, attached to government's "Response and Opposition to Plaintiff's Motions"), his first contention is obviously without merit.

III.

Defendant asserts by way of his "Motion to Dismiss Indictment Upon Impermissibly Promulgated Regulations" that 1) the regulations controlling registration are invalid because sixty days were not allowed

for notice and comment prior to the regulations taking effect and 2) Presidential Proclamation 4771 is invalid because thirty days were not allowed for notice and comment prior to its promulgation. In resistance, the government argues that the sixty day notice and comment regulation has no statutory foundation and amounts to nothing more than an unenforceable internal rule of the Selective Service Commission. Moreover, the notice and comment provision of 50 U.S.C. App. § 463 (b) does not apply to a Presidential Proclamation issued pursuant to 50 U.S.C. App. § 453(a).

In Executive order 12044, the President prescribed a sixty day notice and comment period for agency regulations. 43 Fed. Reg. 12661 (1978). Although the order was made inapplicable to "regulations issued with respect to a military ... function of the United States... Id. at 12644 (§ 6(b)(2)),

the Selective Service subsequently issued a report which stated that, "In accord with Executive Order 12044, at least sixty days will be allowed for comment on proposed regulations in the future." 43 Fed. Reg. 50981 (1978). The Selective Service then published the registration regulations, but only provided for thirty days comment.

It is settled, that in the absence of any congressional authority, executive orders are without the force and effect of law. Liberty Mutual Insurance Company v. Friedman, 639 F. 2d 164, 172 (4th Cir. 1981); Independent Meat Packers Association v. Butz, 526 F. 2d 228, (8th Cir.), cert. denied, 424 U.S. 966 (1975).

Here, there is no apparent underlying statutory foundation for Executive Order 12044. The executive order does not indicate on its face that it was issued pursuant to a statute, and defendants have not shown that

such statutory authority exists. Therefore, the executive order will not be given the force and effect of law and cannot be enforced by the court. Only the Presidence can enforce such an order. See, United States v. Wayte, CR 82-360 (C.D. Cal November 15, 1982).

The regulations were published in accordance with the thirty day notice and comment period required by statute. 50 U.S.C. App. § 463(b). Therefore defendant's motion to dismiss the indictment on account of illegally promulgated regulations will be denied.

Regarding defendant's claim of invalidity of Presidential Proclamation 4771, 50 U.S.C. App. § 453 provides in part that certain men shall register with the Selective Service" ... as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

(emphasis added). However, 50 U.S.C. App. § 463(b) requires thirty days notice and comment for "regulations" but makes no reference to "proclamations." Defendant argues that the distinction is only one of semantics, but the court is not persuaded.

Had Congress intended that presidential proclamations should be subject to the notice and comment provisions, it would have explicitly so provided. Section 463(b) provides in part:

> ...
> After the publication of any regulations and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation.
> ...

Congress clearly intended by this section that only the Director received public comments on proposed rules and regulations. It would be an unprecedented step to require that the President give notice and receive

comments prior to issuance of a presidential proclamation. Nor have counsel cited any authority for such a proposition.

"There is of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." United States v. American Trucking Association, Inc., 310 U.S. 534, 543 (1940); Matter of Covey, 650 F. 2d 877, 880 (7th Cir. 1981). Further, "[as] in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979); Atchinson Topeka and Sante Fe Railroad Company v. United States, 617 F. 2d 485, 490 (7th Cir. 1980).

Selective Service registration began under the draft law of 1917. Ever since that beginning, certain persons have been

subject to registration "... upon proclamation by the President ..." 40 Stat. 80. Although Congress has amended the Selective Service statutes from time to time, the President has always retained the authority to decide when and in what manner a particular registration should proceed. It would not be consistent with the history of the Selective Service Act for Congress to now intend that the President's discretion be limited in this regard by procedural provisions contained in the act. The procedural safeguards are necessary only as a check upon the actions taken by an agency in formulating rules and regulations for, unlike Congress and the President, an agency would otherwise be held unaccountable for its actions.

Moreover, "[p]residential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate

or delegation of authority from Congress." Kuhn v. National Association of Letter Carriers, 570 F. 2d 757, 761 (8th Cir. 1978), citing, Independent Meat Packers Association v. Butz, 526 F. 2d 228, 235 (8th Cir. 1975) cert. denied, 424 U.S. 966 (1975). Here, 50 U.S.C. App. § 453 gives the President clear authority to determine by proclamation, the time, manner and place of registration. Therefore, the presidential proclamation "... is to be accorded the force and effect given to a statute enacted by Congress." Farkas v. Texas Instruments, 375 F. 2D 629, 632 (5th Cir. 1967) cert. denied, 389 U.S. 977 (1967). Statutes enacted by Congress are not subjected to notice and comment periods and no reason appears why the same should not be true for presidential proclamations.

> The same rule of presumptions should be applied to proclamations of the President that is applied to statutes; that is, that they had a valid existence on the day of their date, and no inquiry should be

> permitted upon the subject. Even conceding publication to be necessary, the officer upon whom rests the duty of making it should be conclusively presumed to have promptly and properly discharged that duty.

Lapeyre v. United States, 84 U.S. 191 (1872). 77 Am. Jur. 2d, United States § 47 (1975).

Finally, presidential action taken pursuant to Congressional authorization should be supported by "the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon anyone who might attack it." Dames & Moore v. Regan, 453 U.S. 654, 668 (1980) citing, Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637 (1952).

Applying these standards, this court cannot say that Congress intended no distinction between a presidential proclamation and rules and regulations of a

government agency when enacting §§ 454 and 463.

IV, V, VI.

Defendant's remaining motions to dismiss are without merit.

It is therefore

ORDERED

1. That the word "Beginning" and the phrase "and continuing until on or about August 20, 1982," which appear in lines one and two of the indictment are stricken and the indictment shall now read:

> On or about July 27, 1980, within the Northern District of Iowa, RUSSELL JAMES MARTIN, a male person required to present himself for and submit to registration pursuant to the Military Selective Service Act, rules and regulations duly made pursuant thereto and Presidential Proclamatin No. 4771 of July 2, 1980, did knowingly and wilfully fail, evade and refuse to present himself for and submit to registration in violation of 50 U.S.C. App. §§ 453 and 462(a).

2. Defendant's remaining motions denied.

November 23, 1982.

Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

NO. 82-2505SI

September Term, 1983

UNITED STATES OF AMERICA, Appellee, v. GARY JOHN EKLUND, Appellant.	Appeal from the United States District Court for the Southern District of Iowa

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

May 4, 1984

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

NO. 82-2425NI

September Term, 1983

UNITED STATES OF AMERICA, Appellant, v. RUSSELL JAMES MARTIN, a/k/a RUSTY MARTIN, Appellee.	Appeal from the United States District Court for the Northern District of Iowa

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed and remanded for proceedings consistent with the opinion of

this Court.

May 4, 1984

STATUTORY PROVISIONS

50 U.S.C. App. sec. 453
Registration

(a) Except as otherwise provided in this title [sections 451 to 471a of this Appendix], it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

(b) Regulations prescribed pursuant to subsection (a) of this section may require that persons presenting themselves for and submitting to registration under this section provide, as part of such registration, such identifying information (including date of birth, address, and social security account number) as such regulations may prescribe.

50 U.S.C. App. sec. 462(a)
Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451 to 471a of this appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said section], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by

force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts to the trial of cases arising under this title [said sections], and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

50 U.S.C. App. sec. 462(d)

(d) No person shall be prosecuted, tried, or punished for evading, neglecting, or refusing to perform the duty of registering imposed by section 3 of this title [section 453 of this appendix] unless the indictment is found within five years next after the last day before such person attains the age of twenty-six, or within five years next after the last day before such

person does perform his duty to register, whichever shall first occur.

50 U.S.C. App. sec. 463(b)
Nonapplicability of certain laws

(b) All functions performed under this title [sections 451 to 471a of this Appendix] shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) [sections 551 et seq. and 701 et seq. of Title 5] except as to the requirements of section 3 of such Act [section 552 of Title 5]. Notwithstanding the foregoing sentence, no regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirements of this subsection may be waived by the President in the case of any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued.

PROCLAMATION NO. 4771,

July 2, 1980, 45 F.R. 45247

REGISTRATION UNDER THE SELECTIVE SERVICE ACT,

Section 3 of the Military Selective Service Act, as amended (50 U.S.C.App. 453) [this section], provides that male citizens of the United States and other male persons residing in the United States who are between the ages of 18 and 26, except those exempted by Sections 3 and 6(a) of the Military Selective Service Act [this section and section 456(a) of this Appendix], must present themselves for registration at such time or times and place or places, and in such manner as determined by the President. Section 6(k) [section 456k of this Appendix] provides that such exceptions shall not continue after the cause for the exemption ceases to exist.

The Congress of the United States has made available the funds (H.J.Res. 521, approved by me on June 27, 1980 [Pub.L. 96-282, June 27, 1980, 93 Stat. 552]), which are needed to initiate this registration, beginning with those born on or after January 1, 1960.

NOW, THEREFORE, I, JIMMY CARTER, President of the United States of America, by the authority vested in me by the Military Selective Service Act, as amended (50 U.S.C.App. 451 et seq.) [section 451 et seq. of this Appendix], do hereby proclaim as follows:

1-1. Persons to be Registered and Days of Registration.

1-101. Male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, as amended, who were born on or after January 1, 1960, and who have attained their eighteenth birthday, shall present themselves for registration in the manner and at the time and places as hereinafter provided.

1-102. Persons born in calendar year 1960 shall present themselves for registration on any of the six days beginning Monday, July 21, 1980.

1-103. Persons born in calendar year 1961 shall present themselves for registration on any of the six days beginning Monday, July 28, 1980.

1-104. Persons born in calendar year 1962 shall present themselves for registration on any of the six days beginning Monday, January 5, 1981.

1-105. Persons born on or after January 1, 1963, shall present themselves for registration on the day they attain the 18th anniversary of their birth or on any day within the period of 60 days beginning 30 days before such date; however, in no event shall such persons present themselves for registration prior to January 5, 1981.

1-106. Aliens who would be required to present themselves for registration pursuant to Sections 1-101 to 1-105, but who are in processing centers on the dates fixed for registration, shall present themselves for registration within 30 days after their release from such centers.

1-107. Aliens and noncitizen nationals of the United States who reside in the United States, but who are absent from the United States on the days fixed for their registration, shall present themselves for registration within 30 days after their return to the United States.

1-108. Aliens and noncitizen nationals of the United States who, on or after July 1, 1980, come into and reside in the United States shall present themselves for registration in accordance with Sections 1-101 to 1-105 or within 30 days after coming into the United States, whichever is later.

1-109. Persons who would have been required to present themselves for registration pursuant to Sections 1-101 to 1-108 but for an exemption pursuant to Section 3 or 6(a) of the Military Selective Service Act, as amended [this section or section 456(a) of this Appendix], or but for some condition beyond their control such as hospitalization or incarceration, shall present themselves for registration within 30 days after the cause for their exempt status ceases to exist or within 30 days after the termination of the condition which was beyond their control.

1-2. Places and Times for Registration.

1-201. Persons who are required to be registered and who are in the United States on any day fixed herein for their registration, shall present themselves for registration before a duly designated employee in any classified United States Post Office.

1-202. Citizens of the United States who are required to be registered and who are not in the United States on any of the days set aside for their registration, shall present themselves at a United States Embassy or Consulate for registration before a diplomatic or consular officer of the United States or before a registrar duly appointed by a diplomatic or consular officer of the United States.

1-203. The hours for registration in United States Post Offices shall be the business hours during the days of opera-

tion of the particular United States Post Office. The hours for registration in United States Embassies and Consulates shall be those prescribed by the United States Embassies and Consulates.

1–3. **Manner of Registration.**

1–301. Persons who are required to be registered shall comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service.

1–302. When reporting for registration each person shall present for inspection reasonable evidence of his identity. After registration, each person shall keep the Selective Service System informed of his current address.

Having proclaimed these requirements for registration, I urge everyone, including employers in the private and public sectors, to cooperate with and assist those persons who are required to be registered in order to ensure a timely and complete registration. Also, I direct the heads of Executive agencies, when requested by the Director of Selective Service and to the extent permitted by law, to cooperate and assist in carrying out the purposes of this Proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand this second day of July, in the year of our Lord nineteen hundred and eighty, and of the Independence of the United States of America the two hundred and fourth.

JIMMY CARTER